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In the Supreme Court of the United States

OCTOBER TERM, 1982

JAMES G. WATT, ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether an outer continental shelf lease sale that does not authorize any conduct having a physical impact upon the coast is a federal activity "directly affecting the coastal zone" within the meaning of Section 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. 1456(c)(1).

PARTIES TO THE PROCEEDING

This litigation was commenced by the filing of separate but virtually identical complaints by the State of California and various environmental action groups. Parties plaintiff included the State of California, the California Coastal Commission, the California Air Resources Board, the California Resources Agency, the California Department of Fish and Game, the California Department of Conservation, the Natural Resources Defense Council, Inc., the Sierra Club, Friends of the Earth, Friends of the Sea Otter, and the Environmental Coalition on Lease Sale No. 53. Several California political subdivisions intervened as parties plaintiff in the litigation brought by the State: the Counties of Humboldt, Marin, Mendocino, Monterey, San Diego, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Santa Cruz, and Sonoma, and the Cities of Brisbane, Capitola, Carmel-by-the-Sea, Los Angeles, Morro Bay, Pismo Beach, San Francisco, San Luis Obispo, Santa Barbara, Santa Cruz, Santa Monica, and Seaside, as well as the Association of the Monterey Bay Area Governments. Named as defendants, in addition to the Secretary of Interior, were the United States Department of the Interior, the United States Bureau of Land Management, Edward Hastey, then Acting Director of the United States Bureau of Land Management, and Robert Burford, then Director Designate and now Director, United States Bureau of Land Management. The Western Oil and Gas Association intervened as a party defendant in the litigation, as did Amoco Production Co., Atlantic Richfield Co., Champlin Refining Co., Chevron U.S.A., Inc., Cities Service Co., Conoco, Inc., Exxon Corp., Elf Aquitaine Oil & Gas, Getty Oil Co., Gulf Oil Corp., Phillips Petroleum Co., and Shell Oil Co. Amicus briefs were filed in the Ninth Circuit on behalf of

the Coastal States Organization and the States of Maine, Massachusetts, North Carolina, Florida, Alaska and Oregon.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Secretary of the Interior, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-33a) is reported at 683 F.2d 1253. The opinion of the district court (App. B, *infra*, 34a-78a) is reported at 520 F. Supp. 1359.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1982 (App. C, *infra*, 82a). A timely petition for rehearing was denied on November 10, 1982 (App. D, *infra*, 83a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. 1456(c)(1):

> Each federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the

maximum extent practicable, consistent with approved state management programs.

Pertinent provisions of the Outer Continental Shelf Lands Act, 43 U.S.C. (& Supp. IV) 1331 *et seq.*, are *reprinted in* App. E, *infra*, 87a-99a.

STATEMENT

Pursuant to Section 307(c)(1) of the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. 1456(c)(1), federal "activities directly affecting the coastal zone" are subject to the substantive requirement that they be conducted in a manner that is consistent "to the maximum extent practicable" with an approved state coastal zone management program. This litigation raises the question whether the consistency requirement of Section 307(c)(1) properly applies to an outer continental shelf (OCS) oil and gas lease sale conducted pursuant to the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. (& Supp. IV) 1331 *et seq.*, when that sale has no physical impact upon the coast.

1. a. The Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.*, was enacted in 1972 to encourage the wise use of land and water resources of the coastal zone through the development and implementation of state management programs. 16 U.S.C. 1452.[1] Before a state management program becomes effective, it is approved by the Secretary of Commerce (Sections 1454(h), 1455(c)), who must insure that the views of the federal agencies principally affected by the state's program have been adequately considered (Section 1456(b)). Following approval of a state management program, the actions of federal government licensees

[1] Under the Act, the coastal zone includes coastal waters and adjacent shorelands with the exception of federal property. The zone extends seaward to the outer limit of United States territorial waters, normally three geographical miles from the coastline. 16 U.S.C. 1453(1). The outer continental shelf, by definition, lies outside the coastal zone and beyond the belt conceded to the states by the Submerged Lands Act of 1953. 43 U.S.C. 1301(a)-(b), 1331(a). In the case of California, like all other states bordering on the Pacific or Atlantic Oceans, the "coastal zone," like the Submerged Lands Act grant, extends three geographical miles seaward from the coastline. 43 U.S.C.. 1301(b). See *United States* v. *California*, 381 U.S. 139 (1965).

and permittees, as well as the activities of the federal government itself, must meet the consistency requirements of the Act (Section 1456(c)).

Section 307(c)(1) of the CZMA, 16 U.S.C. 1456(c)(1), requires that each federal agency "conducting or supporting activities directly affecting the coastal zone" conduct or support those activities "in a manner which is, to the maximum extent practicable, consistent with approved state management programs." Pursuant to Commerce Department regulations implementing this provision, federal agencies are required to prepare a document called a "consistency determination" for any activity that will have a direct effect upon a state's coastal zone (15 C.F.R. 930.34). The consistency determination identifies the direct effects of the federal activity and provides the state with an explanation of how the activity has been tailored to achieve consistency with the state program (Section 930.39).

Section 307(c)(3) of the Act, 16 U.S.C. 1456(c)(3), deals with the consistency obligations of federal licensees or permittees. Applicants for federal licenses or permits are required to supply consistency certifications for any "activity affecting land or water uses in the coastal zone." 16 U.S.C. 1456(c)(3)(A) and (B). The state is then given an opportunity to concur in the certification. If the appropriate state authorities refuse to concur, the federal agency from whom the license or permit is sought must reject the application. The state's veto of an applicant's consistency certification can be overridden by the Secretary of Commerce, however, if he finds that the applicant's proposed activity is consistent with the CZMA or is otherwise necessary in the interest of national security (*ibid.*).

b. The Outer Continental Shelf Lands Act was enacted in 1953 to authorize federal leasing of the outer continental shelf beyond the state territorial sea belt for oil and gas development (ch. 345, 67 Stat. 462). See note 1, *supra*. In 1978, Congress amended the OCSLA, Pub. L. No. 95-372, 92 Stat. 632, to provide for, inter alia, the "expeditious and orderly development, subject to environmental safeguards," of resources on the OCS. 43 U.S.C. (Supp. IV) 1332(3). The OCSLA, as amended, provides distinct stages

for federal decisionmaking concerning oil and gas activities on the OCS. The stages can be described as (1) preparation and leasing (Section 1337(a)); (2) exploration (Section 1340); and (3) development and production (Section 1351).[2]

The solicitation of bids and issuance of a lease constitute the first stage in the OCS development process. 43 U.S.C. (Supp. IV) 1337(a). Under the OCSLA, a lease entitles its holder to undertake only extremely limited activity without further federal approval. See 43 U.S.C. (Supp. IV) 1340(c) (approval required prior to exploration), Section 1351 (approval required prior to development and production). Regulations promulgated by the Department of the Interior provide that a lease merely entitles its holder to conduct "preliminary activities" on the OCS. 30 C.F.R. 250.34-1. These "preliminary activities" are defined as "geophysical and other surveys necessary to develop a comprehensive exploration plan" so long as such activities "do not result in any physical penetration of the seabed of greater than 300 feet of unconsolidated formations" and "do not result in any significant adverse impact on the natural resources of the OCS" (*ibid.*). More extensive activity is permitted only upon a lessee's compliance with the procedures and substantive requirements of the next stage: exploration.

Prior to commencing exploration activities, a lessee must submit a detailed exploration plan to the Secretary for approval. 43 U.S.C. (Supp. IV) 1340(c). The Secretary must disapprove a plan if it would likely cause serious harm or damage to life or property or to the marine, coastal or human environment. 43 U.S.C. (Supp. IV) 1340(c)(1). A lessee submitting a plan that affects any land or water use in the coastal zone of a state with an approved management program must also attach a certification that the plan is

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[2] Some provisions of the OCSLA apply throughout all stages of the OCS development process. Regulations promulgated pursuant to 43 U.S.C. (Supp. IV) 1334(a)(1)(B) provide for suspension or temporary prohibition of all OCS operations if "there is a threat of serious, irreparable or immediate harm" to life or the environment. 30 C.F.R. 250.12(a)(1)(ii). The regulations also provide for cancellation of leases if such dangers cannot be resolved. 43 U.S.C. (Supp. IV) 1334(a)(2); 30 C.F.R. 250.12(d)(4).

consistent with the state's coastal zone management program. 43 U.S.C. (Supp. IV) 1340(c)(2); 16 U.S.C. 1456(c)(3)(B). The Secretary may not grant any license or permit for any activity described in an exploration plan until the state concurs with the consistency certification, or a determination of consistency or necessity is made by the Secretary of Commerce. 43 U.S.C. (Supp. IV) 1340(c)(2).

If, following exploration, commercial quantities of oil and gas are discovered, the final stage under the OCSLA is development and production. As with the exploration stage, the lessee must submit a development and production plan to the Secretary for approval. 43 U.S.C. (Supp. IV) 1351(a)(1). The plan must be in compliance with the OCSLA and its implementing regulations, 43 U.S.C. (Supp. IV) 1351(h)(1)(A),[3] and must include a certification of consistency with the coastal zone management plan of any affected state. 43 U.S.C. (Supp. IV) 1351(d); 16 U.S.C. (Supp. V) 1456(c)(3)(B). Approval of development and production plans is contingent upon approval of the final consistency certification. 43 U.S.C. (Supp. IV) 1351(h)(1)(B).

2. On April 27, 1981, the Department of the Interior published a final notice of sale for Lease Sale No. 53, Santa Maria Basin (App. A, *infra*, 11a). The notice announced the Department's decision to offer 111 OCS tracts off central California for leasing under the OCSLA (46 Fed. Reg. 23678-23680 (1981)).[4] Two days later, on April 29, 1981, the

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[3] The Secretary will disapprove a development and production plan if exceptional geological conditions, marine or coastal resource values, or other exceptional circumstances dictate disapproval despite compliance with the OCSLA and its implementing regulations. 43 U.S.C. (Supp. IV) 1351(h)(1)(D).

[4] The Governor of California had previously recommended pursuant to Section 19 of the OCSLA, 43 U.S.C. (Supp. IV) 1345, that certain northern tracts in the Santa Maria Basin be excluded from the sale because they are "directly seaward of the habitat, breeding, and food supply areas of the Southern Sea Otter." C.R. 85; A.R. 224w, at 2 ("C.R." refers to the Clerk's Record, "A.R." refers to the Administrative Record). The Secretary of the Interior determined to lease the entire Santa Maria Basin, despite the Governor's objections, "based on a finding of overriding national interest" (App. A, *infra*, 11a; 43 U.S.C. (Supp. IV) 1345 (c)). The Fish and Wildlife Service, under Section 7 of

State of California filed suit seeking to enjoin the sale of 29 tracts in the northern portion of the Santa Maria Basin. A group of environmental organizations, led by the Natural Resources Defense Council, Inc., filed a substantially identical suit. The complaints alleged that the Department of the Interior had violated Section 307(c)(1) of the CZMA by failing to prepare a consistency determination for Lease Sale No. 53. Plaintiffs also contended that the sale of the contested tracts would be inconsistent with the state's coastal zone management program because of the possible effects of oil development on the sea otter.[5]

The federal government contended that it was not in violation of its obligations under Section 307(c)(1) of the CZMA because Lease Sale No. 53 did not come within the terms of the statute. The government relied upon former Secretary Andrus' administrative determination, reaffirmed by Secretary Watt, that the lease sale had no "direct effects" on California's coastal zone (App. A, *infra*, 10a). The Secretary concluded that Lease Sale No. 53 did not come within the sweep of Section 307(c)(1) because it had no physical impact on the coastal zone. Moreover, the potential effects of oil and gas exploration, development and production on the OCS are specifically subject to the separate consistency certification procedure set forth in Section 307(c)(3)(B) of the CZMA.

On August 18, 1981, the district court entered summary judgment for California and the intervening local governments on their CZMA claim.[6] The court ruled (App. B,

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the Endangered Species Act of 1973, 16 U.S.C. (Supp. V) 1536, had concluded earlier that the sale of the disputed tracts would not "jeopardize the continued existence of the sea otter" (C.R. 85, attachment to A.R. 204w at 13).

[5] In addition, California's and the environmental groups' complaints claimed violations of the National Environmental Policy Act of 196., 42 U.S.C. 4321 *et seq.*, Section 19 of the OCSLA, 43 U.S.C. (Supp. IV) 1345; the Endangered Species Act of 1973, 16 U.S.C. 1331 *et seq.*, and the Marine Mammal Protection Act of 1972, 16 U.S.C. (Supp. V) 1361 *et seq.* The district court resolved these issues in the government's favor (App. B, *infra*, 65a-78a). The court of appeals affirmed (App. A, *infra*, 25a-30a).

[6] The district court had previously entered a preliminary injunction that barred the Department of the Interior from accepting bids on the

infra, 62a-65a) that OCS Lease Sale No. 53 directly affected the coastal zone and the Secretary erred in not providing California with a consistency determination.[7] The court found that leasing directly affects the coastal zone because "leasing sets in motion the entire chain of events which culminates in oil and gas development" (*id.* at 46a). According to the district court, the "direct effects" of a lease sale include all the potential activities that might take place during the later stages of the OCS development process. For example, the court accepted the state's claim that the possibility of an oil spill at the development and production stage was a "direct effect" of the lease sale (*id.* at 63a). The court similarly concluded that all of the possible effects on the coastal zone listed in the Environmental Impact Statement (EIS) and the Secretarial Issue Document (SID) prepared in conjunction with the lease sale were direct effects of the decision to lease (*id.* at 63a-65a). The district court therefore held that the tracts disputed by the State of California could not be leased until the Secretary prepared a consistency determination addressing the steps taken by him to insure that the sale would be consistent with the state's coastal management program.[8]

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challenged tracts, although the court permitted the bids to be received and opened on May 28, 1981. Bids totalling approximately $220,000,000 were received on 19 of the challenged tracts in the Santa Maria Basin.

[7] The district court ruled that the environmental organizations "had no implied right of action to bring claims under the CZMA" (App. A, *infra*, 30a). On appeal, the court of appeals reversed, holding that such organizations had standing under Section 10 of the Administrative Procedure Act, 5 U.S.C. 702 (App. A, *infra*, at 31a). We do not raise standing as a separate issue in this petition because, as to this lease sale, the claims of the state and the environmental groups coincide. Because the state clearly has standing to pursue these issues, no live standing issue is presented. See *Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151, 160 (1981). We reserve the right to challenge the standing of non-governmental entities, including environmental organizations, in future CZMA cases.

[8] The district court's injunction also declared that the bids received on the disputed tracts were "null and void" (App. B, *infra*, 80a). The injunction was stayed pending appeal, and was ultimately modified by the court of appeals. As modified, the portion of the district court's or-

3. On appeal, the Ninth Circuit affirmed. It ruled that an OCS lease sale "directly affects" the coastal zone within the meaning of Section 307(c)(1) of the CZMA because it establishes "the basic scope and charter for subsequent development and production" (App. A, *infra*, 13a). To support this conclusion, the court of appeals adopted the district court's list of direct effects developed from the EIS and SID prepared for Lease Sale No. 53 (*id.* at 12a-13a). The court of appeals reasoned that California's expansive interpretation of Section 307(c)(1)'s "directly affecting" threshold standard served the purposes of the Act better than the government's "narrow definition" because an OCS lease sale is "the first link in a chain of events which could lead to production and development of oil and gas on the individual tracts leased" (App. A, *infra*, 13a). Accordingly, it held that the Secretary of the Interior is required to prepare a consistency determination addressing all potential exploration, development and production activities prior to effectuating an OCS lease sale.[9]

REASONS FOR GRANTING THE WRIT

The court of appeals has effectively amended the federal consistency requirements of the Coastal Zone Management Act of 1972 by reading the term "directly" out of Section 307(c)(1) of the Act. The decision below subjects an outer continental shelf lease sale to CZMA consistency requirements, even though Congress in the 1976 Amendments to the CZMA and the 1978 Amendments to the Outer Continental Shelf Lands Act clearly provided for a contrary re-

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der that voids the bids on the disputed tracts is stayed pending the preparation of a consistency determination by the Secretary of the Interior (App. A, *infra*, 24a).

[9] The court of appeals held that the Secretary of the Interior must prepare a consistency determination for Lease Sale No. 53 (App. A, *infra*, 24a). The court declared, however, that federal activities directly affecting the coastal zone need not be "as consistent with [a state] plan as is *possible*" (App. A, *infra*, 19a) (emphasis in original). Rather, the Secretary "must set the leasing, development, and production activities on a path that is consistent with the state plan to the maximum extent practicable in light of the then available knowledge" (*id.* at 22a).

sult. The court of appeals' expansive construction of Section 307(c)(1), moreover, may well impose CZMA consistency requirements on a plethora of federal activities only tenuously connected with a coastal zone. Because the CZMA places substantive limitations upon federal activities, in contrast to the procedural, informational requirements of the National Environmental Policy Act of 1972, 42 U.S.C. 4331 *et seq.*, the burden imposed upon the federal government by the lower court's overly broad reading of Section 307(c)(1) is both significant and unwarranted.

1. Section 307(c)(1) of the CZMA imposes consistency obligations only upon those federal actions "directly affecting the coastal zone."[10] The decision of the court of appeals, however, subjects an OCS lease sale to the consistency provisions of Section 307(c)(1) notwithstanding the fact that any impact of the sale on California's coastal zone is speculative, remote, and subject to further consistency review under Section 307(c)(3) of the Act. The court, in short, has accorded no meaning to the statutory term "directly." Instead, the court has made its own perceptions of public policy "determinative of the outcome" (*Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U.S. 176, 220 (1980)), in apparent disregard of the statute actually enacted by Congress. While courts are not "'at liberty to imply a condition which

[10] Congress prescribed two discrete thresholds for the consistency limitations contained in Section 307(c) of the CZMA. Applicants for federal licenses or permits must comply with the consistency obligations of the Act if they are "to conduct an activity affecting" the state's coastal zone (16 U.S.C. 1456(c)(3)(A)). In contrast, the consistency obligations of the federal government are triggered only when government activities "directly affect [ ]" the coastal zone (Section 1456(c)(1)). Congress presumably intended that the term "directly affecting" in Section 307(c)(1) be given a different and more restrictive meaning than the "affecting" standard utilized in Section 307(c)(3). See generally, *Russell* v. *Law Enforcement Assistance Administration*, 637 F.2d 354, 356 (5th Cir. 1981); *Lankford* v. *Law Enforcement Assistance Administration*, 620 F.2d 35, 36 (4th Cir. 1980); cf. *FTC* v. *Simplicity Pattern Co.*, 360 U.S. 55 (1959). But, whatever the scope of the "affecting" standard in Section 307(c)(3)—an issue not presented here—it is clear that Congress pointedly qualified the trigger for consistency determinations in case of governmental activities by adding the word "directly" in Section 307(c)(1).

is opposed to the explicit terms of [a] statute,'" neither are they free to delete a condition from the explicit terms of a statute, for to do so "'is not to construe the Act but to amend it.'" *Fedorenko* v. *United States*, 449 U.S. 490, 513 (1981), quoting *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U.S. 21, 38 (1934). The court of appeals' construction of Section 307(c)(1) does not comport with the plain terms of the statute, its legislative history, or a functional analysis of its operation.

Although the district court dismissed the government's appeal to plain meaning as a "subterfuge" (App. B, *infra*, 59a) and the court of appeals eschewed any "narrow definition" (App. A, *infra*, 13a) of the statute before it, the fact remains that the conventional construction of the term "directly" is at odds with the conclusion of both courts. "The word 'direct' implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely, or collaterally—to produce the effect." *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 307 (1936). See also *Webster's Third New International Dictionary*, (3d ed. unabridged 1971) ("without any intervening agency or instrumentality of a determining influence"). Far from having a proximate impact on the coastal zone, an OCS lease sale is "only a preliminary and relatively self-contained stage within an overall oil and gas development program which requires substantive approval and review prior to * * * each [successive stage]." *North Slope Borough* v. *Andrus*, 642 F.2d 589, (D.C. Cir. 1980). While the possible impacts of oil exploration and production may be hypothesized at the lease sale stage of the OCS development process, these potential effects are remote in time from the OCS lease sale, depend upon the discovery of oil or gas on the lease site, and are preceded by a federal review procedure that includes a CZMA consistency determination. 16 U.S.C. (Supp. V) 1456(c)(3)(B); 43 U.S.C. (Supp. IV) 1351. The effects of an OCS lease sale on the coastal zone, including the ones noted by the courts below (App. A, *infra*, 12a-13a; App. B, *infra*, 62a-65a), are clearly "indirect."[11] Thus, the

[11] This conclusion comports with regulatory language developed under the National Environmental Policy Act of 1969. NEPA regulations

plain import of the term "directly" requires reversal of the court of appeals.

The legislative history of Section 307(c)(1) also contradicts the court of appeals' conclusion that the statute applies to an OCS lease sale because of the possible future effects of oil exploration and production. When the CZMA was originally drafted in 1972, there was substantial disagreement whether federal property physically located in the coastal zone—such as parks and military installations—should be subject to state coastal zone management programs.[12] The Conference Committee created a compromise provision: it excluded federal lands from inclusion in the actual coastal zone but provided that consistency would be required for activities conducted on federal lands that "directly affect" the coastal zone. See H.R. Rep. No. 92-1544, 92d Cong., 2d Sess. 12 (1972). The term "directly affecting" the coastal zone, therefore, was created to serve a limiting function: to identify those federal activities that would be subject to the consistency requirements of Section 307(c)(1) while at the same time excluding other activities from the operation of the Act.[13] The lower court's contrary

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define "direct effects" as those "which are caused by the action and occur at the same place and time," while "indirect effects" are those "reasonably foreseeable" effects that are "caused by the action" but "are later in time or farther removed in distance." 40 C.F.R. 1508.8. See page 21, *infra*.

[12] The bill passed by the Senate defined the "coastal zone" as excluding federal property. See S. Rep. No. 92-753, 92d Cong., 2d Sess. 8-9, 45 (1972). The House bill, however, included federal property within the definition of "coastal zone." See H.R. Rep. No. 92-1049, 92d Cong., 2d Sess. 2 (1972). Both bills imposed consistency requirements only on federal activities "in" the coastal zone (H.R. Rep. No. 92-1049, *supra*, at 5; S. Rep. No. 92-753, *supra*, at 54). Thus, the House bill would have required consistency for all federal activities on government lands physically located in the coastal zone; the Senate bill would have exempted government activities on federal lands from such a requirement.

[13] The "directly affecting" threshold of Section 307(c)(1) was clearly designed to limit the consistency obligations of the federal government for activities conducted on federal lands within the confines of a state's coastal zone. A fortiori, the standard limits the consistency obligations

conclusion (App. A, *infra*, 14a) that the term was designed by Congress to expand the consistency requirements of the Act is unsupported by the legislative history.[14]

Finally, the court of appeals' expansive interpretation of "directly affecting" cannot be reconciled with a functional analysis of how Congress intended the CZMA to operate. In Section 307(a) and (b) of the Act, 16 U.S.C. 1456(a), (b), Congress directed the Secretary of Commerce to coordinate his administration of the CZMA "with other interested federal agencies" and to refrain from approving a state program until the views of the federal agencies principally affected by a proposed management program "have been adequately considered." Through this process, Congress anticipated that any aspect of a state's coastal zone program that was deemed to be impracticable by federal agencies would be "iron[ed] out" prior to approval. H.R. Rep. No. 92-1049, 94th Cong., 2d Sess. 19 (1972). This federal agency pre-approval review process is vital because, once a state management plan is approved by the Secretary of Commerce, the consistency provisions of Section 307(c)(1) apply to federal actions that directly affect the

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of the government for activities—such as OCS oil and gas leasing—that take place outside the coastal zone.

[14] The only legislative support for the court of appeals' expansive interpretation of Section 307(c)(1) is derived from post-enactment statements contained in House and Senate Committee Reports prepared in connection with the 1980 Amendments to the CZMA. H.R. Rep. No. 96-1012, 96th Cong., 2d Sess. 34 (1980); S. Rep. No. 96-783, 96th Cong., 2d Sess. 10 (1980). Both reports, in nearly identical language, suggest that the Commerce Department adopt an expansive definition of "activities directly affecting the coastal zone." The 1980 Amendments to the CZMA, however, did not address—through enactment or amendment—any of the consistency provisions of the CZMA. These statements, therefore, are entitled to little weight. *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980); *County of Washington* v. *Gunther*, 452 U.S. 161, 176 n.16 (1981); *United States* v. *Clark*, 445 U.S. 23, 33 n.9 (1980); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979). Moreover, when the chairman of the House subcommittee was queried about the language of the pending 1980 report on the floor of the House, he replied that it was not intended to "modify the term directly affecting." 126 Cong. Rec. H10111-H10112 (daily ed. Sept. 30, 1980).

coastal zone. The court of appeals' abandonment of the term "directly" in Section 307(c)(1) undermines this carefully designed congressional scheme.

A federal agency cannot intelligently assess a proposed state management plan unless it knows which of its activities will be implicated by the state program. Section 307(c)(1) provides the agency with an important guidepost: a state management program will affect those activities that have a clear, immediate and identifiable impact on the coastal zone. The lower courts' deletion of the term "directly" from Section 307(c)(1), however, effectively eliminates this guidance. Henceforth, a federal activity will come within a state coastal management plan so long as a possible impact on the coastal zone can be hypothesized.[15] Under the lower courts' approach, such a broad range of federal activities fall within Section 307(c)(1) .hat any "ironing out" of federal/state disagreements on future state management plans may well be impossible. The decision, furthermore, renders past federal agency input into approved management programs largely superfluous: the examining agencies clearly did not assume that a proposed state plan would control any federal activity possessing a foreseeable, albeit tenuous, link to the coastal zone. Unless the Court restores the term "directly" to Section 307(c)(1) of the CZMA, many federal activities not previously considered at the pre-approval stage will suddenly become subject to the consistency requirements of the Act.

2. The decision of the court of appeals disregards not only the plain language of Section 307(c)(1) of the CZMA, but a carefully designed congressional scheme for development of OCS resources as well. The outer continental shelf oil and gas development process is a controversial program with broad significance for the nation's economy, environment, foreign relations and tax revenues. Accordingly, Congress has devoted considerable attention to devising a balanced, yet effective, statutory structure for the program. See, e.g., OCSLA Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 632. As part of that effort, Congress has

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[15] See note 21, *infra*, pages 20-21.

expressly integrated the consistency requirements of the CZMA into the OCS oil and gas development process. The court of appeals' decision, however ignores this congressional prescription for application of the CZMA and works to undermine the effectiveness of the 1978 Amendments to the OCSLA.

a. In 1978, the Outer Continental Shelf Lands Act was substantially rewritten by Congress to balance environmental protection with promotion of "the swift, orderly and efficient exploitation of our almost untapped domestic oil and gas resources in the Outer Continental Shelf." *Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151, 154 n.2 (1981). In that measure, Congress recognized that the OCS oil and gas program is a unique federal undertaking because neither the government, the industry, nor the states can determine, at the outset, what actual oil and gas production activities (such as the placement of platforms and pipelines or the utilization of tankers) will eventually take place on the OCS. Unlike a dam, road, or waterway project, the final contours of the completed activity cannot be predicted until the leasing and exploration processes are well under way. Plainly put, the ultimate effects of issuing an OCS oil and gas lease depend not upon the contours of the lease sale but on the type, quantity and location of commercially valuable hydrocarbon resources discovered through exploration. Accordingly, Congress created a unique federal decisionmaking regime by dividing the OCS process into separate and discrete stages. Under this system of phased decisionmaking, the initial determination to authorize oil and gas activity on a tract in the OCS, by offering it at a lease sale, can be modified or reversed at the later exploration or development and production stages.

The final House Report on the 1978 Amendments explained the purpose behind prescribing this staged method of federal decisionmaking (H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 164 (1977)):

> Section 25 is intended to provide the mechanism for review and evaluation of, and decision on, development and production in a leased area, after consultation and coordination with all affected parties.

> The committee considers this one of the most important provisions of the 1977 amendments. It provides a means to separate the Federal decision to allow private industry to explore for oil and gas from the Federal decision to allow development and production to proceed if the lessee finds oil and gas. The failure to have such a mechanism in the past has led to extensive litigation prior to lease sales, when onshore and environmental impacts of production activity are not yet known. In fact, the failure to have this procedure has led, in part, at least one court to invalidate an entire lease sale.

Thus, Congress dealt with the problem of incomplete information regarding OCS resources and the "onshore and environmental impacts of production activity" by altering the structure of federal decisionmaking. Rather than confronting every possible question regarding production at the lease sale stage, decisions would be made at later, specifically identified stages, when the maximum amount of information would be available.

Under the amended OCSLA, a lease does not authorize the lessee to explore, develop or produce oil or gas. To engage in these activities, the lessee must seek separate federal approvals, first to explore for oil and gas and later to develop and produce the resource. 43 U.S.C. (Supp. IV) 1340, 1351. As restricted by the OCSLA, a lease is a property interest that only entitles the holder to conduct certain preliminary surveys prior to submitting an exploration plan for approval (43 U.S.C. (Supp. IV) 1340(c)(1); 30 C.F.R. 250.34-1). The "direct" effects of a lease sale, therefore, are extremely limited, and do not include the effects of potential exploration, development and production activities for which the lessee may eventually obtain approval.[16]

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[16] Other courts have recognized the limited nature of the lease sale decision, and have accordingly molded the obligations of other generally applicable procedural and substantive federal laws to the OCS process. *County of Suffolk* v. *Secretary of the Interior*, 562 F.2d 1368 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978) (NEPA); *North Slope Borough* v. *Andrus*, 642 F.2d 589 (D.C. Cir. 1980) (Endangered Species Act); *Conservation Law Foundation* v. *Andrus*, 623 F.2d 712 (1st Cir. 1979) (NEPA). As the District of Columbia Circuit noted, "[m]an-

b. The task of integrating the CZMA's consistency requirements into this unique decisionmaking process is not difficult, inasmuch as Congress has addressed the matter explicitly. In 1974, parallel to the efforts to amend the OCSLA to respond to the energy crisis, Congress initiated efforts to amend the CZMA to accommodate energy related activities, including expedited OCS oil and gas leasing. At the outset of this amendatory process, there was disagreement over whether the term "license or permit" in Section 307(c)(3) of the CZMA, 16 U.S.C. 1456(c)(3), covered leases under the OCSLA. S. Rep. No. 94-277, 94th Cong., 1st Sess. 19 (1975).

To clarify this matter, bills reported out of committees in both the House and the Senate proposed inserting the term "lease" into Section 307(c)(3), 16 U.S.C. 1456(c)(3). Addition of the term "lease" to Section 307(c)(3) would mean:

> [I]n practical terms, * * * that the Secretary of the Interior would need to seek the certification of consistency from adjacent State governors before entering into a binding lease agreement with private oil companies.

S. Rep. No. 94-277, 94th Cong., 1st Sess. 19-20 (1975). The Executive Branch, however, opposed this proposed amendment on the same ground that eventually persuaded Congress to amend the OCSLA: lack of information at the lease sale stage. An official of the Department of the Interior testified (*Coastal Zone Management: Hearings on H.R. 1776, H.R. 2928, H.R. 3124, et al., Before the Subcomm. on Oceanography of House Comm. on Merchant Marine and Fisheries*, 94th Cong., 1st Sess. 204 (1975) (statement of Royston C. Hughes, Assistant Secretary of the Interior)):

> Our concern is that people may construe this as a requirement that the lease applicant prove Federal consistency before he is physically able to do it. If he does not know what he is going to find out there and he has

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datory stage-by-stage review prevents the telescoping of any and every projected hazard to * * * the environment into one overwhelming statutory obstacle. The OCSLA standards are not less strict, they simply rely more on achieving compliance than on exacting proscription." *North Slope Borough* v. *Andrus*, *supra*, 642 F.2d at 609.

> no way of quantifying what he intends to bring ashore, there may be, if this requirement is placed in amendment to the Coastal Zone Management Act, a legal bar to us issuing a lease. It is like a chicken-and-egg situation, from our point of view.

Throughout this debate, the focus of attention rested solely on whether the consistency procedures of Section 307(c)(3) should apply at the leasing stage. No one suggested that the proposed amendment would be redundant because Section 307(c)(1) already required such a consistency determination.

Although the amendment as proposed passed the Senate, it was deleted by the House. 122 Cong. Rec. 6128 (1976). The expressed purpose for this floor action was to permit the conference committee to study the impact of the amendment. *Ibid.* At conference, the committee did not restore the deleted amendment; instead it created a new subsection of Section 307(c)(3) that required lessees seeking federal approval of exploration, development and production plans to first comply with CZMA consistency certification requirements. Section 307(c)(3)(B), 16 U.S.C. (Supp. V) 1456(c)(3)(B). The Conference Report explained (S. Conf. Rep. No. 94-987, 94th Cong., 2d Sess. 30 (1976); H.R. Rep. No. 94-1298, 94th Cong., 2d Sess. 30 (1976)):

> The conference substitute * * * specifically applies the consistency requirement to the basic steps in the OCS leasing process—namely, the exploration, development and production plans submitted to the Secretary of the Interior. This provision will satisfy state needs for complete information, on a timely basis, about the details of the oil industry's offshore plans.

The conference substitute was enacted by Congress and this special consistency provision for oil and gas leases on the OCS, 16 U.S.C. 1456(c)(3)(B), was subsequently integrated into the 1978 Amendments to the OSCLA. 43 U.S.C. (Supp. IV) 1340(c)(2), 1351(d).

The 1976 Amendments to the CZMA and the 1978 Amendments to the OCSLA thus represent a congressional repudiation of the court of appeals' conclusion that all the potential effects of OCS lease sales are subject to CZMA consistency review at the lease sale stage. Like most who

first encounter the issue, the congressional committees in 1976 initially thought that consistency review at the OCS leasing stage was desirable. But, when acquainted with the practical consequences of such a requirement and the impossibility of satisfying it in a meaningful manner, Congress ultimately rejected that approach. Instead, it substituted special consistency requirements specifically designed to mesh with the structure of the OCS decision-making process. 16 U.S.C. (Supp. V) 1456(c)(3)(B); 43 U.S.C. (Supp. IV) 1340(c)(2), 1351(d). By expansively defining "directly affecting the coastal zone" and requiring a consistency determination at the leasing stage for potential OCS exploration, development and production activities, the court of appeals has adopted an approach that Congress expressly considered and rejected. The lower court's construction of Section 307(c)(1) is clearly a "creature of judicial cloth, not legislative cloth." *Weinberger* v. *Catholic Action*, 454 U.S. 139, 141 (1981).

3. The decision of the court of appeals will severely hamper congressionally mandated development of the nation's oil and gas reserves on the outer continental shelf. Congress carefully amended the OCSLA in 1978 to provide for "expedited exploration and development of the Outer Continental Shelf * * *." 43 U.S.C. (Supp. IV) 1802(1). See *Watt* v. *Energy Action Educational Foundation*, *supra*, 454 U.S. at 154 n.2. One of the prime goals of the 1978 Amendments to the OCSLA was to avoid "extensive litigation prior to lease sales." H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 164 (1977). By reducing the scope and consequences of the decision to issue an OCS lease, Congress sought to avoid the major cause of delay in the OCS process: injunctive litigation over lease sales. *Ibid.*[17] The deci-

[17] In recent years, suits to enjoin OCS lease sales have been filed by the States of Alaska, California, Maine, Massachusetts, New Jersey, New York, and North Carolina. California alone has initiated litigation against five of the last six OCS sales off its coast. Even after enactment of the 1978 Amendments to the OCSLA, Congress noted that litigation was a major obstacle to expeditious oil and gas development on the OCS (H.R. Rep. No. 95-1835, 95th Cong., 2d Sess. 20 (1979)):

> Most agree that the main reason for delays in OCS development have been the lawsuits which even when successful [for the federal government] have led to extensive stays of activities.

sion below, however, undermines this congressional objective and actually invites litigation at the lease sale stage.

The court of appeals' broad reading of Section 307(c)(1) will prompt an increase in OCS litigation for at least two reasons. First, by imposing a consistency requirement on potential exploration, development and production activities at the lease sale stage, the opinion forces substantive decisions to be made prematurely, when adequate information is not available to support a reasoned choice. Such federal decisions can be expected to be prime targets for the opponents of OCS lease sales.[18] Second, the Ninth Circuit's suggestions concerning a standard for consistency at the leasing stage are inherently vague. The court stated that "Interior * * * must set the leasing, development, and production activities on a path that is consistent with the state plan to the maximum extent practicable in the light of the then available knowledge" (App. A, *infra*, 22a). But the court confessed that it was unable to "delineate[ ]" when the appropriate degree of consistency would be achieved for a particular lease sale (*ibid.*). While it prescribed a "path" to eventual consistency, it refused to provide a "verbal formula[ ]" to test the adequacy of the government's efforts at the lease sale stage (*ibid.*). Instead, the court suggested that each OCS lease sale would have to be examined on a case-by-case basis (*ibid.*). This case-by-case approach will stall the OCS oil and gas leasing process for years

[18] Since the decision below, two other courts have issued injunctions against OCS lease sales pending the preparation of consistency determinations. *California* v. *Watt*, No. 82-2284 (CHH) (GH) (C.D. Cal. June 9, 1982); *Governor Thomas Kean* v. *Watt*, No. 82-2420 (D. N.J. Oct. 8, 1982).

Many of the upcoming OCS lease sales are adjacent to states within the Ninth Circuit. Therefore, the Department of the Interior will prepare consistency determinations for all sales scheduled to be held prior to this Court's disposition of this case. States that have already received such consistency determinations have disputed the conclu ons and the adequacy of the analysis contained in the statements. Letter from James Souby (State of Alaska) dated December 30, 1982, regarding Sale 57 (Norton Sound); Letter from James Hoyte (Commonwealth of Massachusetts) dated January 17, 1983, regarding Sale 52 (Georges Bank).

while the states and the federal government litigate the procedural adequacy and substantive content of discrete lease sale consistency determinations.[19]

4. In addition to hampering the OCS oil and gas leasing process, the court of appeals' expansive definition of "directly affecting the coastal zone" may severely disrupt a wide range of federal activities. As explained above (page [illegible], *supra*), Congress assumed that federal objections to state coastal zone management programs would be resolved prior to program approval by the Secretary of Commerce. Twenty-eight programs of state or territorial governments have now been approved, and federal agencies, including the Department of Defense, are obligated to conduct any activities "directly affecting the coastal zone" in a manner that is consistent "to the maximum extent practicable" with those programs.[20] 16 U.S.C. 1456(c)(1). The court of appeals' conclusion that a mere indirect influence on the coastal zone satisfies the "directly affecting" threshold test subjects a wide range of federal actions and programs to the substantive limitations of Section 307(c)(1).[21] The court's

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[19] The Ninth Circuit apparently sought to alleviate the inevitable litigation delays engendered by its decision by providing a role for the Secretary of Commerce in the Section 307(c)(1) consistency process. The court concluded that the Secretary of Commerce was authorized to mediate a resolution of opposing viewpoints (App. A, *infra*, 23a). Despite the absence of a national interest override provision in Section 307(c)(1), the court suggested that the Secretary could "reconcile the paramountcy of the national interest with the concerns of the state" according to "those procedures explicitly set forth in subsections [307](c)(3) and (h)" (*ibid.*). Existing regulations, however, clearly state that mediation of disputes by the Secretary of Commerce is wholly voluntary and the states are free to seek relief in the courts without resorting to mediation. 15 C.F.R. 930.43; 930.116. Moreover, even if the Secretary of Commerce did possess some binding decisionmaking power, his ruling may well be subject to judicial review as final agency action under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

[20] By statute, a coastal state is any state bordering the Atlantic, Pacific, or Arctic Oceans, the Gulf of Mexico, Long Island Sound, or the Great Lakes. 16 U.S.C. (Supp. V) 1453(4).

[21] By holding (App. A, *infra*, 13a) that a direct effect upon the coastal zone exists whenever a federal agency sets in motion a chain of events that may lead to impacts on the coastal zone, the Ninth Circuit

expansive reading of "directly affecting the coastal zone," therefore, extends the reach of the CZMA far beyond what was contemplated when the Act was passed or the state programs were approved.

The court of appeals' wholesale use of the environmental impacts disclosed by Lease Sale No. 53's environmental impact statement (EIS) in identifying direct effects under Section 307(c)(1) of the CZMA is particularly disturbing. Under the National Environmental Policy Act of 1969, a federal agency preparing an EIS must address both the direct and the indirect effects of its proposed action upon the environment.[22] By treating all of the potential coastal zone effects identified in an impact statement as direct effects for CZMA purposes, the lower courts have obliterated the difference between a direct and an indirect effect. In terms of complying with NEPA, the distinction between the two types of effects may not be significant, but for CZMA purposes the difference is vital. The consistency requirement of the CZMA imposes a *substantive* limitation on federal activities. NEPA, in contrast, has a fundamentally proce-

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has adopted a test that requires consistency for federal activities having no identifiable, immediate, or clear relationship with a coastal zone. Virtually any tenuous connection between a decision to authorize a federal activity and a subsequent potential impact on the coastal zone could qualify as a direct effect under the court's definition. If consistency with the oil pipeline provisions of a coastal state's management plan is required before an OCS lease sale can be held, consistency might also be required for a federal coal lease sale in Wyoming. There, the "direct effect" upon the coastal zone would be the possibility that a lessee might use a proposed slurry pipeline to transport coal to a Gulf Coast port. In neither case does the initial federal decision have an immediate impact upon a coastal zone. But, as reasoned by the Ninth Circuit, each activity does set in motion a chain of events that may impact the coastal zone.

[22] The regulations define the term "effects" to include:

> (a) Direct effects, which are caused by the action and occur at the same time and place.
>
> (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably forseeable. * * *

40 C.F.R. 1508.1.

dural, informative purpose, and does not prescribe the substantive content of federal decisions. See *Strycker's Bay Neighborhood Council* v. *Karlen*, 444 U.S. 223 (1980). By employing the table of contents of an EIS to determine the "direct effects" upon the coastal zone, and reading the word "directly" out of Section 307(c)(1) of the CZMA, the court has transformed the procedural obligations of NEPA into a substantive limitation on federal action. This result invites chaos for the activities of the federal government as a whole.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-5699
DC# CV 81-2080-MRP

THE STATE OF CALIFORNIA, ACTING BY AND THROUGH GOVERNOR EDMUND G. BROWN, JR., THE CALIFORNIA COASTAL COMMISSION, THE CALIFORNIA AIR RESOURCES BOARD, THE CALIFORNIA RESOURCES AGENCY, THE CALIFORNIA DEPARTMENT OF FISH AND GAME, THE CALIFORNIA DEPARTMENT OF CONSERVATION, PLAINTIFFS-APPELLEES,

v.

JAMES G. WATT, AS SECRETARY OF THE INTERIOR; THE UNITED STATES DEPARTMENT OF THE INTERIOR; EDWARD HASTEY, AS ACTING DIRECTOR OF THE UNITED STATES BUREAU OF LAND MANAGEMENT; ROBERT BURFORD, AS DIRECTOR DESIGNATE OF THE UNITED STATES BUREAU OF LAND MANAGEMENT, IN HIS OFFICIAL CAPACITY AS DIRECTOR WHEN AND IF ASSUMED; THE UNITED STATES BUREAU OF LAND MANAGEMENT, DEFENDANTS,

WESTERN OIL AND GAS ASSOCIATION, A REGIONAL TRADE ASSOCIATION; AMOCO PRODUCTION COMPANY, A CORPORATION; ATLANTIC RICHFIELD COMPANY, A CORPORATION; CHAMPLIN REFINING COMPANY, A CORPORATION; CHEVRON U.S.A. INC.; CITIES SERVICE COMPANY, A CORPORATION; CONOCO, INC.; ELF ACQUITAINE OIL AND GAS, A CORPORATION; EXXON CORPORATION; GETTY OIL COMPANY, A CORPORATION; GULF OIL CORPORATION; PHILLIPS PETROLEUM COMPANY, A CORPORATION; AND SHELL OIL COMPANY, A CORPORATION, DEFENDANTS-IN-INTERVENTION/ APPELLANTS.

No. 81-5700
DC# CV 81-2081-MRP

NATURAL RESOURCES DEFENSE COUNCIL, INC.; THE SIERRA CLUB; FRIENDS OF THE EARTH; FRIENDS OF THE SEA OTTER; AND THE ENVIRONMENTAL COALITION ON LEASE SALE 53, PLAINTIFFS-APPELLEES,

v.

JAMES G. WATT, AS SECRETARY OF THE INTERIOR, ETC., ET AL., DEFENDANTS,

WESTERN OIL AND GAS ASSOCIATION, A REGIONAL TRADE ASSOCIATION, ETC., ET AL., DEFENDANTS-IN-INTERVENTION/APPELLANTS.

No. 81-5701
DC# CV 81-2080-MRP

STATE OF CALIFORNIA, ACTING BY AND THROUGH GOVERNOR EDMUND G. BROWN, JR., ETC., ET AL., PLAINTIFFS-APPELLEES,

COUNTY OF HUMBOLDT; COUNTY OF MARIN; COUNTY OF MENDOCINO; COUNTY OF MONTEREY; COUNTY OF SAN LUIS OBISPO; COUNTY OF SAN MATEO; COUNTY OF SANTA BARBARA; COUNTY OF SANTA CLARA; COUNTY OF SANTA CRUZ; COUNTY OF SONOMA; CITY AND COUNTY OF SAN FRANCISCO; CITY OF BRISBANE; CITY OF CAPITOLA; CITY OF CARMEL-BY-THE-SEA; CITY OF LOS ANGELES; CITY OF MORRO BAY; CITY OF PISMO BEACH; CITY OF SAN LUIS OBISPO; CITY OF SANTA BARBARA; CITY OF SANTA CRUZ; CITY OF SANTA MONICA; CITY OF SEASIDE; ASSOCIATION OF MONTEREY BAY AREA GOVERNMENTS, PLAINTIFFS-IN-INTERVENTION/APPELLEES,

v.

JAMES G. WATT, AS SECRETARY OF THE INTERIOR, ETC., ET AL., DEFENDANTS-APPELLANTS.

No. 81-5811
DC# CV 81-2081-MRP

NATURAL RESOURCES DEFENSE COUNCIL, INC., ETC., ET AL., PLAINTIFFS,

COUNTY OF SAN DIEGO, PLAINTIFF-IN-INTERVENTION/ APPELLANT,

v.

JAMES G. WATT, AS SECRETARY OF THE INTERIOR, ETC., ET AL., DEFENDANTS-APPELLEES,

WESTERN OIL AND GAS ASSOCITION, A REGIONAL TRADE ASSOCIATION, ETC., ET AL., DEFENDANTS-IN-INTERVENTION/APPELLEES.

No. 81-5812
DC# CV 81-2081-MRP

NATURAL RESOURCES DEFENSE COUNCIL, INC., ETC., ET AL., PLAINTIFFS-APPELLANTS,

v.

JAMES G. WATT, AS SECRETARY OF THE INTERIOR, ETC., ET AL., DEFENDANTS-APPELLEES,

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No. 81-5813
DC# CV 81-2080-MRP

STATE OF CALIFORNIA, ACTING BY AND THROUGH GOVERNOR EDMUND G. BROWN, JR., ETC., ET AL., PLAINTIFFS,

COUNTY OF SAN DIEGO, PLAINTIFF-IN-INTERVENTION/ APPELLANT,

v.

JAMES G. WATT, AS SECRETARY OF THE INTERIOR, ETC., ET AL,. DEFENDANTS-APPELLEES,

WESTERN OIL AND GAS ASSOCIATION, A REGIONAL TRADE ASSOCIATION, ETC., ET AL., DEFENDANTS-IN-INTERVENTION/ APPELLEES.

No. 81-5814
DC# CV 81-2081-MRP

NATURAL RESOURCES DEFENSE COUNCIL, INC., ETC., ET AL., PLAINTIFFS,

COUNTY OF HUMBOLDT, ETC., ET AL., PLAINTIFFS-IN-INTERVENTION/APPELLANTS,

v.

JAMES G. WATT, AS SECRETARY OF THE INTERIOR, ETC., ET AL., DEFENDANTS-APPELLEES,

WESTERN OIL AND GAS ASSOCIATION, A REGIONAL TRADE ASSOCIATION, ETC., ET AL., DEFENDANTS-IN-INTERVENTION/APPELLEES.

No. 81-5815
DC# CV 81-2080-MRP

THE STATE OF CALIFORNIA, ACTING BY AND THROUGH GOVERNOR EDMUND G. BROWN, JR., ETC., ET AL., PLAINTIFFS-APPELLANTS,

COUNTY OF HUMBOLDT, ETC., ET AL., PLAINTIFFS-IN-INTERVENTION,

v.

JAMES G. WATT, AS SECRETARY OF THE INTERIOR, ETC., ET AL., DEFENDANTS-APPELLEES,

WESTERN OIL AND GAS ASSOCIATION, A REGIONAL TRADE ASSOCIATION, ETC., ET AL., DEFENDANTS-IN-INTERVENTION/APPELLEES.

No. 81-5720
DC# CV 81-2081-MRP

NATURAL RESOURCES DEFENSE COUNCIL, INC., ETC., ET AL., PLAINTIFFS-APPELLEES,

COUNTY OF HUMBOLDT, ETC., ET AL., PLAINTIFFS-IN-INTERVENTION/APPELLEES,

v.

JAMES G. WATT, AS SECRETARY OF THE INTERIOR; ETC., ET AL., DEFENDANTS-APPELLANTS,

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No. 81-5822
DC# CV 81-2080-MRP

THE STATE OF CALIFORNIA, ACTING BY AND THROUGH GOVERNOR EDMUND G. BROWN, JR., ETC., ET AL., PLAINTIFFS,

COUNTY OF HUMBOLDT, ETC., ET AL., PLAINTIFFS-IN INTERVENTION/APPELLANTS,

v.

JAMES G. WATT, AS SECRETARY OF THE INTERIOR, ETC., ET AL., DEFENDANTS-APPELLEES.

Filed Aug. 12, 1982

OPINION

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding
Argued and Submitted January 15, 1982

Before: SNEED, TANG, and PREGERSON, *Circuit Judges*

SNEED, *Circuit Judge:*

This appeal concerns a dispute over the proposed sale by the United States Department of Interior of leases to drill for and extract oil and gas in the outer continental shelf (OCS) off the coast of California.

Plaintiffs below were the State of California and various agencies within the state. Intervening as plaintiffs were various cities and counties in California (hereafter "local governments"). Plaintiffs in a companion case, which was consolidated with this one, were the Natural Resources Defense Council, the Sierra Club, Friends of the Earth, Friends of the Sea Otter, and the Environmental Coalition on Lease Sale 53 (hereafter "environmental groups"). Defendants in both cases below were James G. Watt, acting in

his official capacity as Secretary of the Interior, the Department of Interior, Robert Burford, acting in his official capacity as Director of the Bureau of Land Management, and the Bureau of Land Management (BLM). Intervening as defendants in both actions were Western Oil and Gas Association (WOGA), a regional trade association of companies and individuals in the petroleum industry, and various oil companies that had submitted high bids on one or more tracts offered in Lease Sale No. 53.

Plaintiffs claimed below that defendants violated five federal statutes in offering for competitive bidding certain oil and gas leases on tracts located in the Santa Maria Basin. Finding that there were no genuine issues of material fact in the two consolidated cases, the district court granted summary judgment to the plaintiffs on their claim based on the Coastal Zone Management Act (CZMA), granted summary judgment to defendants on the remaining issues, and dismissed the claims of the environmental groups for lack of standing. The court enjoined leasing of the disputed tracts and ordered the bids and deposits returned but stayed the effect of the latter order pending appeal.[1] All parties ap-

[1] The district court order reads as follows:

"ORDER AND SUMMARY JUDGMENT

The parties' cross-motions for summary judgment, pursuant to Fed.R.Civ.P. 56, and defendant-intervenors' motion for summary judgment, or, in the alternative, motion to dismiss the complaints of Natural Resources Defense Council, *et al.*, and of the County of Humboldt, *et al.*, pursuant to Fed.R.Civ.P. 12(b)(6), came on for hearing before the Honorable Mariana R. Pfaelzer on July 10, 1981. All parties appeared by and through their respective counsel of record. Having reviewed and considered the administrative record and the memoranda, affidavits, and exhibits filed by the parties, and having heard and considered the oral arguments of counsel, and having taken the matter under submission, the Court has incorporated its Findings of Fact and Conclusions of Law in the Opinion filed herewith. Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Plaintiffs' Motion for Summary Judgment in CV 81-2080, with respect to the claim arising under the Coastal Zone Management Act, 16 U.S.C. §§ 1451 *et seq.*, is granted. Defendants'

pealed. We affirm in part, reverse in part, vacate in part, and stay in part.

I.

ISSUES ON APPEAL

There are four issues on appeal which we state as follows:

1. CZMA Issue: Did the Secretary of Interior violate Section 307(c)(1) of the CZMA by selling oil and gas leases for the outer continental shelf without a determination of

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Motion for Summary Judgment with respect to plaintiffs' claim arising under the Coastal Zone Management Act is denied.

2. Defendants' decision to lease Tracts 129 to 142, 144 to 146, 148 to 155 and 158 to 161 in the northern portion of the Santa Maria Basin for oil and gas development was made in violation of the Coastal Zone Management Act.

3. Any bids received for the tracts at issue are declared null and void and the monies posted shall be returned to the bidders.

4. Any oil and gas leases for any of the tracts at issue herein awarded as part of Lease Sale No. 53 are declared null and void.

5. Defendants and defendant-intervenors, their officers, agents, employees, representatives, and all persons acting in concert with them, are hereby enjoined from awarding, approving or taking any action or allowing others to take any action pursuant to any leases for any of the tracts at issue, until such time as defendants comply with the requirements of the Coastal Zone Management Act by conducting a consistency determination on the tracts at issue and by conducting all activities on these tracts in a manner consistent with California's Coastal Management Plan.

6. Defendants' Motion for Summary Judgment in CV 81-2080 with respect to plaintiffs' claims arising under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 *et seq.*, the National Environmental Protection Act, 42 U.S.C. §§ 4321 *et seq.*, the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, and the Marine Mammal Protection Act, 16 U.S.C. §§ 1361 *et seq.*, is granted. Plaintiffs' Motion for Summary Judgment in CV 81-2080 with respect to the claims arising under these statutes is denied.

7. Defendant-intervenors' Motion to Dismiss Plaintiffs, Natural Resources Defense Council, *et al.*, in CV 81-2081 pursuant to Fed.R.Civ.P. 12(b)(6) is granted.

8. Defendant-intervenors' Motion to Dismiss Plaintiff-intervenors County of Humboldt, *et al.*, in CV 81-2080 pursuant to Fed.R.Civ.P. 12(b)(6) is denied.

9. Each party shall bear its own costs.

10. Judgment is hereby entered.

The Court shall retain continuing jurisdiction over this case to ensure compliance with this Order."

California v. Watt, 520 F. Supp. 1359, 1389 (C.D. Cal. 1981).

consistency with California's coastal zone management plan? Our answer is that he did.

2. NEPA Issue: Did the Department of Interior violate the National Environmental Policy Act (NEPA) by failing to supplement the Environmental Impact Statement? Our answer is that it did not.

3. OCSLA Issue: Did the Secretary violate section 19 of the Outer Continental Shelf Lands Act (OCSLA) by refusing to accept the recommendations of the governor of the State of California regarding Lease Sale 53? Our answer is that he did not.

4. Standing Issue: Do the environmental groups have standing to enforce the consistency determination provision of the CZMA? Our answer is that they do.

II.

STANDARD OF REVIEW

As already noted, summary judgment was granted by the district court on all issues. Our review is identical to that of the district court. *Washington ex rel. Edwards v. Heinmann*, 633 F.2d 886, 888 n.1 (9th Cir. 1980). That is, we may affirm a summary judgment only if, viewing the evidence in the light most favorable to the party against whom it is granted, we find no genuine issue of material fact, and we find that the prevailing party is clearly entitled to judgment as a matter of law. *Id.* at 888; *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1300 (9th Cir. 1981).

III.

FACTS AND BACKGROUND

While the facts and background of these cases are complex, they are thoroughly laid out in the district court opinion. *California v. Watt*, 520 F. Supp. 1359, 1365-68 (C.D. Cal. 1981). To aid the reader of this opinion, however, we shall summarize briefly the pertinent facts and background of these cases.

The lease sale in dispute is Lease Sale 53, consisting of a maximum offering of 243 designated tracts of the OCS for

mineral development. The tracts in Lease Sale 53 lie in five different basins off the coast of California, including the Santa Maria Basin. That basin extends generally from Point Sur in Monterey County in the north to Point Conception in Santa Barbara County in the south. During the course of decision-making on Lease Sale 53, the Department of Interior at various times proposed leasing within the Santa Maria Basin only and at other times within all five of the basins originally included.

In November 1977, BLM issued a Call for Nominations for Lease Sale 53. The Call requested the petroleum industry to designate specific tracts on which it was interested in bidding if a sale were held. It also asked federal, state, and local governments, universities, environmental organizations, research institutions, and the public to identify specific tracts that they believed should be excluded from leasing or should be leased under particular restrictions due to conflicting resource values or environmental factors. In October 1978 the Department of Interior announced the tentative tract selection for Lease Sale 53. The Santa Maria Basin contained 115 of the 243 tracts involved in the sale.

A draft Environmental Impact Statement (EIS) was released for public comment in April 1980. The draft EIS, which analyzed the environmental impacts in the five basins to be included in Lease Sale 53, was based on a reserve estimate of 404 million barrels of oil for the Santa Maria Basin.

In September, 1980, a final EIS was released. Shortly before its publication, on or about August 28, 1980, the United States Geological Survey made available revised reserve estimates for the Santa Maria Basin in the amount of 794 million barrels of oil. The revised estimate was incorporated in an addendum to the EIS. A Secretary Issue Document (SID), an internal document intended to aid the Secretary in making decisions concerning lease sales, was released in October 1980. The SID concerned the potential impact of Lease Sale 53 on the environment, and concluded that a supplemental EIS was not needed.

On July 6, 1980, the California Coastal Commission requested that the Secretary submit a consistency determina-

tion at the time of the issuance of the proposed notice of sale. On October 16, 1980, the former Secretary of the Interior, Cecil D. Andrus, issued the proposed notice of sale for Lease Sale 53. The notice proposed leasing only within the Santa Maria Basin, the four other basins being deleted from the proposed sale. By letter of October 22, 1980, the Department of Interior notified the California Coastal Commission (CCC) of its "negative determination," to the effect that the preleasing activities associated with Lease Sale 53 would have no "direct effects" on California's coastal zone, and that as a consequence no consistency determination was necessary. In response to this negative determination, on December 16, 1980, the CCC adopted a resolution that the deletion of 29 tracts in the northern portion of the Santa Maria Basin was necessary in order for Lease Sale 53 to be consistent with the California Coastal Management Plan. On December 24,1980, Governor Edmund G. Brown, Jr. of California, responding to Secretary Andrus' proposed notice of sale, recommended the deletion of 32 tracts located in the northern portion of the Santa Maria Basin.

The new Secretary of Interior, James G. Watt, issued a revised proposed notice of sale for Lease Sale 53 on February 10, 1981. The four basins previously deleted from the proposed sale by former Secretary Andrus were once more included in the sale. The revised notice continued to propose leasing in the Santa Maria Basin. In transmitting the revised proposal to Governor Brown, Secretary Watt requested recommendations pursuant to section 19 of the OCSLA, 43 U.S.C. § 1345. By letter dated April 7, 1981, Governor Brown submitted his recommendations concerning the revised Lease Sale 53. He reiterated his position that, based upon the balancing test of section 19, the northern 32 tracts in the Santa Maria Basin should be deleted from the sale. Enclosed with the letter detailing Governor Brown's recommendations were comments and recommendations from various state agencies and local governments in California.

On April 10, 1981, the Department of Interior issued a news release in which Secretary Watt announced that he planned to divide Lease Sale 53 into two sales, with the

sale of the tracts in the Santa Maria Basin to be held in May 1981 and the sale of the remaining tracts to be postponed. The Secretary stated that his decision to lease the entire Santa Maria Basin was based on a finding of overriding national interest. The final notice of sale for Lease Sale 53, Santa Maria Basin, was published on April 27, 1981.

By letter dated May 1, 1981, Secretary Watt notified Governor Brown of the rejection of California's recommendations concerning the lease sale in the Santa Maria Basin, and provided a brief explanation of the basis for the rejection.

On April 29, 1981, California sought an injunction in district court against the lease sale. The court, although it allowed bids on the tracts to be received and opened, on May 27, 1981, granted a preliminary injunction which prevents the Department of Interior from accepting or rejecting the bids or issuing leases on the disputed tracts. California and the local governments moved for summary judgment on their claim that Lease Sale 53 violated numerous statutes. Secretary Watt and the other federal defendants cross-claimed for summary judgment on the same issues. The response of the district court to these motions has already been indicated.

We find that no genuine issue of material fact exists. The questions before us, therefore, are whether the parties prevailing below are clearly entitled to their judgments as a matter of law. We now turn to the four legal issues with which this appeal is concerned.

IV.

COASTAL ZONE MANAGEMENT ACT

This issue concerns the application of CZMA Section 307(c)(1), 16 U.S.C. § 1456(c)(1), to the lease sale stage of outer continental shelf (OCS) oil, gas, and mineral development. Section 307(c)(1) reads:

> Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

While it is conceded on appeal that this section does apply at the lease sale stage, the parties vigorously dispute whether Lease Sale 53 would have "direct effects" on California's coastal zone.

We hold that Lease Sale 53 would "directly affect" the state's coastal zone. The district court so held and we agree. The federal appellants and oil companies (hereafter collectively referred to as "federal appellants") propose a definition of "directly affecting" that limits the scope of direct effects from a lease sale to those effects that "are part of, or immediately authorized by, a lease sale." *See* Brief For The Federal Appellants at 21-22; Brief of Appellants Western Oil & Gas Association at 27. Subsequent steps such as the promulgation of exploration or development plans are not direct effects of the lease sale, their argument runs, because separate consistency determinations are required at each of these later stages. It follows that a lease sale has no direct effects upon the coastal zone; such direct effects as there may be affect things other than the coastal zone. This definition and reasoning underlies the Secretary of Interior's determination that no consistency determination is required.

California, the local governments, and the amici curiae environmental groups (hereafter collectively referred to as "California") propose a broader definition of "directly affecting," encompassing effects of the lease sale that the lessor "reasonably anticipates." Another formulation of this definition is that any activity having a functional interrelationship from an economic, geographic, or social standpoint with lands and waters in the coastal zone directly affects the coastal zone. The district court adopted this broad definition, holding that the federal appellants "cannot deny that leasing activities have consequences in the coastal zone by pointing to a series of events which occur after the leases are issued, but before the actual effects are realized." *California v. Watt, supra*, 520 F. Supp. at 1379-80.

We agree that the lease sale in this case directly affects the coastal zone. These direct effects of Lease Sale 53 on California's coastal zone are detailed by the district court. *Id.* at 1371, 1380-82. We need not repeat them here. It is

enough to point out that decisions made at the lease sale stage in this case establish the basic scope and charter for subsequent development and production. Prior to the sale of leases, critical decisions are made as to the size and location of the tracts, the timing of the sale, and the stipulations to which the leases would be subject. These choices determine, or at least influence, whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed to danger, the flow of vessel traffic, and the siting of on-shore construction. *Id.*

Under these circumstances Lease Sale 53 established the first link in a chain of events which could lead to production and development of oil and gas on the individual tracts leased. This is a particularly significant link because at this stage all the tracts can be considered together, taking into account the cumulative effects of the entire lease sale, whereas at the later stages consistency determinations would be made on a tract-by-tract basis under section 307(c)(3). The narrow definition of "directly affecting" urged upon us by the federal appellants would diminish the ability of the state to protect its coastal zone and to influence activities that were set in motion at the lease sale stage.

A. *Purpose of the CZMA*

This diminution would not be consistent with the purposes of the CZMA, which was enacted to promote the preservation of natural resources in the coastal zone. 16 U.S.C. § 1452(1). Under the Act, each coastal state has primary authority over the lands and waters within its three-mile coastal zone, to be exercised "in cooperation with Federal and local governments and other vitally affected interests." 16 U.S.C. § 1451(i).

A key element in the CZMA's comprehensive plan is the voluntary adoption by each coastal state of a federally-approved coastal zone management plan, which must adequately consider the "national interest" and "the views of Federal agencies principally affected by such program." 16 U.S.C. §§ 1455(c)(8), 1456(b). The Act requires the state's plan to include "a planning process for energy facilities like-

ly to be located in, or which may significantly affect, the coastal zone, including, but not limited to, a process for *anticipating and managing* impacts from such facilities." 16 U.S.C. § 1454(b)(8) (emphasis added). A quid pro quo for the state's development of such a plan is that certain federal activities will be conducted consistently with the state's plan. 16 U.S.C. § 1456(c).

Thus, a major purpose of the CZMA is to avoid conflict and encourage cooperation between the federal and state governments in developing a comprehensive plan for long-term management of the resources in the coastal zone. 16 U.S.C. §§ 1451, 1452. To effectuate this purpose, the state must be permitted to become involved at an early stage of a significant and comprehensive activity, such as Lease Sale 53, that will eventually have an appreciable impact on the coastal zone. The narrow definition urged upon us by the federal appellants would preclude this early involvement.

B. *Legislative History*

Our approach is not inconsistent with the legislative history of the CZMA. Although, as the district court pointed out, the legislative history of this Act is "inconclusive," 520 F. Supp. at 1371, it does lend support, when considered as a whole, to our approach.

In 1972, the Conference Committee substituted the phrase "directly affecting the coastal zone" for "in the coastal zone," in an apparent attempt to expand the scope of the provision. *See id.* No clue is given in 1972 as to how "directly" was to be interpreted. In 1976, in conjunction with amendments to CZMA sections other than 307(c)(1), the Senate Report noted:

> There is very little coordination or communication between Federal agencies and the affected coastal States prior to major energy resource development decisions, such as the decision to lease large tracts of the OCS for oil and gas.
>
> ... Full implementation of the Coastal Zone Management Act of 1972 ... could go far to institute the broad objectives of Federal-State cooperative planning envisioned by the framers of the act.

S. Rep. No. 277, 94th Cong., 2d Sess. 3, *reprinted in* 1976 U.S. Code Cong. & Ad. News 1770.

In the Coastal Zone Management Improvement Act of 1980, Pub. L. No. 96-464, 94 Stat. 2060 (1980), Congress did not amend the section 307(c)(1) consistency provisions, but the reports of both the Senate and House Committees support a broad interpretation of "directly affecting." *See* 520 F. Supp. at 1372-73. The Senate report stated that:

> intergovernmental coordination for purposes of OCS development commences *at the earliest practicable time* in the opinion of the Committee, as the Department of the Interior *sets in motion a series of events which have consequences* in the coastal zone.

S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980) (emphasis added). The House Committee specifically addressed the uncertainty that had arisen concerning the interpretation of the threshold test of "directly affecting" the coastal zone. H. R. Rep. No. 1012, 96th Cong., 2d Sess. 34-35, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4382-83. The Committee offered two alternative definitions of the phrase "directly affecting:" (1) The threshold test applies "whenever a Federal activity [has] a functional interrelationship from an economic, geographic or social standpoint with a State coastal program's land or water use policies." *Id.* at 34, U.S. Code Cong. & Ad. News at 4382. (2) The Federal consistency requirements should apply "when a Federal agency initiates a series of events of coastal management consequence." *Id.* The House indicated its support of an "expansive interpretation of the threshold test," *id.* at 35, U.S. Code Cong. & Ad. News at 4383, and reiterated the Senate's statement that consultation between federal and state agencies should occur "at the earliest practicable time." *Id.* at 34, U.S. Code Cong. & Ad. News at 4382; *see also* S. Rep. No. 783, *supra*.

We recognize that these post-enactment committee statements might not represent a view adopted by Congress after full deliberation and, in any event, are not conclusive. However, these statements must be given appropriate weight. *See Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980); *Walt Disney Productions v. United States*, 480 F.2d

66, 68 (9th Cir. 1973), *cert. denied*, 415 U.S. 934 (1974). In the circumstances of this case we accord them substantial weight because they appear to us to serve better the purposes of the CZMA than would the narrower interpretation urged by the federal appellants.

C. *National Oceanic and Atmospheric Administration's Interpretation.*

Our approach does no violence to our obligation to pay deference to the appropriate agency's interpretation of section 307(c)(1). The National Oceanic and Atmospheric Administration (NOAA) is the agency within the Department of Commerce charged with the responsibility of promulgating regulations for the CZMA. *American Petroleum Institute v. Knecht*, 456 F. Supp. 889, 908 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979). Its current view of the definition of "directly affecting" is unclear.

Until May 1981, NOAA consistently took the position that pre-leasing activities were subject to consistency review, and favored a broad interpretation of "directly affecting." *See Watt v. California*, *supra*, 520 F. Supp. at 1376-77. In 1978, NOAA stated that section 307(c)(1) was intended to apply to "all Federal actions which were *capable of significantly affecting* the coastal zone." 43 Fed. Reg. 10,510-11 (1978) (emphasis added). Although NOAA deleted this definition in 1979 in response to a Department of Justice opinion taking issue with that portion of the definition, 44 Fed. Reg. 37,142 (1979), it reiterated the view that "Federal agencies are encouraged to construe liberally the 'directly affecting' test in borderline cases so as to favor inclusion of Federal activities subject to consistency review." 44 Fed. Reg. 37,146-47 (1979). Along the same lines in 1980, NOAA noted:

> In our view Federal consistency requirements subject final notices of OCS sales to consistency determinations. This critical decision point in the OCS process influences tracts to be selected and stipulations to be imposed and thus sets in motion actions which will *invariably* affect coastal resources.

Letter from NOAA to State Coastal Management Program Directors (April 9, 1980) (emphasis added).

In May 1981, shortly after complaints were filed in the present case, NOAA filed a notice of proposed rulemaking defining "directly affecting" in a way more nearly consistent with, if not identical to, that urged on us by the appellants. 46 Fed. Reg. 26,658-59 (1981). According to the definition, a federal activity directly affects the coastal zone only:

> if the Federal agency finds that the conduct of the activity itself produces a measurable physical alteration in the coastal zone or that the activity initiates a chain of events reasonably certain to result in such alteration, *without further required agency approval.*

Id. (emphasis added). In the comments to this notice, NOAA listed lease issuance as an example of an activity that would not be subject to a consistency determination because it does not directly affect the coastal zone. *Id.* at 26,660. On July 2, 1981, NOAA issued its notice of final rulemaking. In late July and early August, however, resolutions were introduced in both houses of Congress disapproving the new regulations. *Cf.* 16 U.S.C. § 1463a. After the district court decision in this case, and following a vote by the House Merchant Marine and Fisheries Committee to disapprove the regulations on October 16, 1981, NOAA suspended the effective date of the regulations and moved to withdraw them, explictly acknowledging the negative reaction it had received from both Congress and the coastal states. 46 Fed. Reg. 50,937, 50,976 (1981).

An agency's interpretation of a statute, while not having the force of law, is entitled to deference if we can conclude that the regulation "implement[s] the congressional mandate in some reasonable manner." *United States v. Vogel Fertilizer Co.*, ___ U.S. ___, 102 S.Ct. 821, 827 (1982), *quoting United States v. Correll*, 389 U.S. 299, 307 (1967); *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, Nos. 80-7673, 81-7021, slip. op. at 1243-44 (9th Cir. March 22, 1982). This general principle of deference, while fundamental, only sets the framework for judicial analysis, *United States v. Vogel Fertilizer Co., supra*, 102 S.Ct. at 827,

quoting United States v. Cartwright, 411 U.S. 546, 550 (1973), and poses no obstacle in this case to our rejection of appellants' approach.

As indicated, NOAA's short-lived narrow definition of "directly affecting" was first proposed during the pendency of this litigation, was specifically disapproved by some members and at least one Committee of Congress, was contrary to NOAA's longstanding position on the matter, and may not reflect NOAA's present view. To defer to such a passing phase in the appropriate agency's interpretation would amount to obeisance to shadows and a flight from judicial responsibility. On the other hand, we acknowledge that NOAA's earlier view that "directly affecting" should be liberally construed provides support to our holding that Lease Sale 53 must be accompanied by a section 307(c)(1) consistency determination.

D. *Consistency with Outer Continental Shelf Lands Act*

The federal appellants also claim that a definition of "directly affecting," other than one substantially similar to NOAA's aborted narrow view, is inconsistent with section 19 of the OCSLA. This section provides for Department of Interior consideration of state governors' recommendations regarding "size, timing, or location" of lease sales. We acknowledge, as we must, that federal statutes should be construed in a consistent and harmonious manner. Only in this way can congressional intent can be given its fullest expression. *Get Oil Out! Inc. v. Exxon Corp.*, 586 F.2d 726, 729 (9th Cir. 1978).

We find no conflict between our holding with respect to the scope of "directly affecting" as applicable to the facts of this case and the functions and purposes of the OCSLA. The CZMA and the OSCLA focus on different concerns—the OCSLA on development of oil and gas resources, and the CZMA on environmental concerns. *American Petroleum Institute v. Knecht*, *supra*, 456 F. Supp. at 919. They impose on the federal government separate obligations owing to different parties, and are capable of co-existence. Their consistency is further supported by the "savings clause" in the OCSLA, which expressly provides: "[N]oth-

ing in this Act shall be construed to modify, or repeal any provision in the Coastal Zone Management Act of 1972." 43 U.S.C. § 1866. We, therefore, conclude that Lease Sale 53 cannot proceed until the Secretary of Interior makes a determination that the proposed lease is consistent, to the maximum extent practicable, with the California coastal zone management plan.

E. *Placement of Final Authority to Determine That the OCS Lease Sale 53 is Consistent to the Maximum Extent Practicable*

To hold that the Secretary of Interior is required by CZMA § 307(c)(1) to make a consistency determination before going ahead with Lease Sale 53 unavoidably raises additional issues. Foremost among these is whether consistency to the maximum extent practicable of the federal activity with the approved state management program means simply conformity to the program in the manner deemed appropriate by the state concerned. The federal appellants insist that the district court, in effect, so held by enjoining the lease sale "until such time as defendants comply with the requirements of the Coastal Zone Management Act by conducting a consistency determination on the tracts at issue and by conducting all activities on these tracts in a manner consistent with California's Coastal Management Plan." 520 F. Supp. at 1389.

Assuming *arguendo* that the district court did so hold, we here reject that interpretation of the CZMA. The statute does not provide that a state's plan takes precedence when it would preclude the federal activity, or even that the federal activity must be as consistent with the plan as is *possible*. It only provides that the activity be consistent *to the maximum extent practicable*. The Act is not explicit with respect to the location of final authority to determine whether the required consistency exists. We believe such authority must reside in the Executive Branch of the federal government subject, of course, to such judicial review as is appropriate. To hold otherwise on the basis of silence, or at best attenuated inferences drawn from the language of

Congress, weighs too lightly the interests of the nation against that of a state.

Our conclusion is supported by the language and structure of both the CZMA and the OCSLA, as well as the history of events leading to the enactment of the OCSLA.

1. CZMA.

With respect to any plan for the exploration, development, and production stages, section 307(c)(3) of the CZMA sets out an elaborate procedure for dealing with disagreements between a coastal state and an applicant for a federal license or permit to conduct an activity affecting the coastal zone concerning the consistency of the federal activities and the state's management program. Under this section, to obtain a federal license or permit the state must certify that the activity is consistent unless the Secretary of Commerce properly finds that the activity "*is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.* 16 U.S.C. § 1456(c)(3)(A)–(B) (emphasis added). This provision clearly precludes an irreversible state veto of OCS activity at the exploration, development, and production stages. The Secretary of Commerce is given the final say as to whether the activity is consistent with the objectives of the CZMA, and if not, whether it is otherwise necessary in the interest of national security. It would be anomalous for Congress to have provided the state with final authority unilaterally to nip these activities in the bud, by reason of the application of section 307(c)(1) to lease sales, in the face of its careful scheme in section 307(c)(3) to assure that a state cannot unilaterally stop the activity at later stages. We do not think it intended to so provide.

2. OCS History and the OCSLA.

The history of the dispute concerning offshore resources supports our conclusion that a conclusive state veto was never intended over OCS oil and gas development. In 1953, to settle the long-standing dispute between the federal government and coastal states concerning control over offshore areas, Congress enacted the Submerged Lands Act, 43

U.S.C. §§ 1301-43. This "1953 Compromise" of the so-called Tidelands Oil Issue granted coastal states "title to and ownership of" submerged lands within three miles of the coast, the area refered to as the "coastal zone." 43 U.S.C. §§ 1301(a), 1311(a). The federal government was given exclusive proprietary control over "the soil and seabed of the Continental Shelf" outside this three-mile zone. 43 U.S.C. §§ 1302, 1332(a). The CZMA was not intended to change this division of control. Section 307(e) of the CZMA provides that:

> Nothing in this title shall be construed—
> (1) to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters.

16 U.S.C. § 1456(e). *See also*, H. R. Conf. Rep. No. 1544, 92d Cong., 2d Sess. 7, 12 (1972).

Granting final veto power to coastal states would thwart the purposes of the OCSLA. As the Supreme Court has recently stated, "Congress primarily was concerned in enacting OCSLA to assure federal control over the Shelf and its resources." *Gulf Offshore Co. v. Mobil Oil Corp.*,— U.S. ____, 101 S. Ct. 2870, 2877 (1981). In 1978, in response to concern over increased dependence on foreign oil, the OCSLA was amended to:

> establish policies and procedures for managing the oil and natural gas resources of the [OCS] which are intended to result in expedited exploration and development of the [OCS] in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade.

43 U.S.C. § 1802(1). These are vitally important goals for the well-being of the country, and the ultimate management authority over their achievement is vested in the federal government and not a particular coastal state.

Section 19 of the OSCLA, 43 U.S.C. § 1345, it is true, instructs the Secretary of Interior to consider recommendations by the Governor of an affected state regarding the size, timing, or location of a proposed lease sale. 43 U.S.C.

§1345(a). The section gives great weight to the Governor's recommendations, providing that the Secretary of Interior "shall accept" them if they provide a reasonable balance between the national interest and the well-being of the citizens of the state. Nevertheless, it is explicitly provided that the Secretary's decision to reject such recommendation is final, unless his decision is arbitrary or capricious. 43 U.S.C. § 1345(c)(d). The finality of the Secretary of Interior's decision under this section is another strong indication that the federal government is intended to have the ultimate authority over the OCS leasing program.

We, therefore, interpret section 307(c)(1) to require that Lease Sale 53 be made consistent with California's plan to the maximum extent practicable. Accommodation to California's plan to a lesser extent does not afford consistency *to the maximum extent practicable*. Accommodation to a greater extent exceeds the command of the statute. In making this consistency determination, the Secretary of Interior may take into account that further consistency determinations will be made at the exploration, development, and production stages, when more complete information will be available. *See* 16 U.S.C. § 1456(c)(3). In other words, the lease sale need not be configured so as to preclude *any* possible future inconsistency from arising as development proceeds. The Secretary of Interior, however, must set the leasing, development, and production activities on a path that is consistent with the state plan to the maximum extent practicable in light of the then available knowledge.

The limit beyond which conformity with a state plan would not be practicable to the maximum extent cannot be precisely delineated. Such factors as the extent to which leasing, exploration, development, drilling, and production would be hampered or prescribed by conformity; the reasonableness of the state plan; as well as the terms of the particular proposed lease sale must be examined. Beyond this it is difficult to go; verbal formulas cannot eliminate the necessity of examining each situation with care and sensitivity to the concerns of the state and the nation.

3. Settlement of Disputes as to Consistency by Secretary of Commerce.

Inasmuch as the Secretary of Interior has not yet made the consistency determination that we hold he must with respect to Lease Sale 53, it is not possible to know whether the Secretary of Interior and the State of California will disagree on whether the required consistency determination reflects consistency "to the maximum extent practicable." In making the consistency determination, the Secretary of Interior undoubtedly will be guided by a spirit of federal/state cooperation. Should the state disagree with the Secretary's consistency determination, sections 307(c) and (h) contain mediation procedures that may be invoked by the Secretary of Commerce to reconcile the paramountcy of the national interest with the concerns of the state. We do not regard subsection (c)(1) of section 307 as lacking, or existing independently of, those procedures explicitly set forth in subsections (c)(3) and (h).

F. *Remedy*

As already indicated, the district court's order required the federal appellants to conduct "all activities on [the tracts at issue] in a manner consistent with California's Coastal Management Plan." 520 F. Supp. at 1389. The premise on which this order rests appears to be that California's view of consistency ultimately will be controlling. We do not agree with this premise. We therefore, affirm only that portion of paragraph 5 of the district court's order that requires a consistency determination to be made before lease Sale 53 goes forward. That is, paragraph 5 is affirmed insofar as it reads:

> Defendants and defendant-intervenors, their officers, agents, employees, representatives, and all persons acting in concert with them, are hereby enjoined from awarding, approving or taking any action or allowing others to take any action pursuant to any leases for any of the tracts at issue, until such time as defendants comply with the requirements of the Coastal Zone Management Act by conducting a consistency determination on the tracts at issue. . . .

We modify that paragraph to delete the remainder, which provides as follows: "and by conducting all activities on these tracts in a manner consistent with California's Coastal Management Plan." If the State does not agree with a determination of consistency by the Secretary of Interior, the dispute-resolution procedures of the CZMA are available.[2]

The district court also voided the bids for the tracts at issue and ordered the deposits returned to the bidders. *Id.* The federal appellants and oil companies argue that the cancellation of bids after their contents have been revealed is excessive, punitive, unprecedented, and destroys the essence of secret bidding procedures, thus causing the loss of millions of dollars the bidders spent compiling the data for the bids.[3] They argue that such drastic measures should be deferred at least until it is finally decided whether Lease Sale 53 can go forward in its present form. We agree. The resolution of the dispute must await a consistency determination by the Secretary of Interior. If the state does not agree with this determination, final resolution of the conflict must await the outcome of the CZMA dispute resolution procedures. During the pendency of these procedures, the status quo should be maintained. Therefore, we stay the portion of the district court's order (*i.e.*, paragraphs 3 and 4) requiring the cancellation of the bids and return of the deposits and that portion of paragraph 5 of the order which required that federal lease sale activities be conducted consistently with California's coastal zone management plan.

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[2] Appellants also object to the district court's failure to perform a "particularized analysis" of possible remedies and the consequences, as required by Alaska v. Andrus, 580 F.2d 465 (D.C. Cir.), *vacated in part on other grounds*, 439 U.S. 922 (1978). Although this claim appears to have merit, we do not reach the issue of the applicability of Alaska v. Andrus, in view of our disposition on other grounds of the remedy ordered below.

[3] WOGA concedes that it suggested to the lower court the very remedy to which it now objects, but this does not affect our decision on this issue.

To the extent that the deleted portion of paragraph 5 also requires that all other activities, including exploration, development, or production, be conducted consistently with California's plan, it embraces activities and stages of offshore oil development not at issue in this case. Only the lease sale is at issue. We therefore vacate the district court's order insofar as it extends beyond the lease sale stage.

Finally, we retain jurisdiction over this appeal, and if the consistency determination process is not completed within a reasonable time we will entertain a motion to vacate our stay.

On the CZMA issue, therefore, we hold as follows:

(1) We affirm the district court's order insofar as it requires a consistency determination for Lease Sale 53.

(2) We stay the district court's order insofar as it declares bids and leases null and void and requires return of monies posted and insofar as it requires federal lease sale activities to be conducted consistently with California's coastal zone management plan.

(3) We vacate the district court's order insofar as it applies beyond the lease sale stage.

V.

NATIONAL ENVIRONMENTAL POLICY ACT

California also sought to enjoin the lease sale on the basis of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331, *et seq.* It contends that the federal government's failure to supplement the Environmental Impact Statement (EIS) to incorporate the latest estimates of oil and gas reserves in the basin was a violation of section 102(2)(c) of NEPA, 42 U.S.C. § 4332(2)(c). That section requires that an EIS be prepared and circulated for major federal actions affecting the quality of the human environment.

The Bureau of Land Management (BLM) released the final EIS on Lease Sale No. 53 in early September, 1980, incorporating the original estimates of oil and gas reserves provided by the United States Geological Survey (USGS). A few days before the release of the EIS, on August 28,

1980, the USGS released revised estimates of the oil and gas reserves. These new figures indicated that the reserves were thought to be roughly twice those originally estimated. Although the BLM did not alter the body of the EIS to reflect the new figures, it did attach the new estimates to the EIS as an Addendum. Also, a Secretary Issue Document (SID) was prepared for the Secretary of Interior in October, 1980, containing revised estimates of the environmental impacts using the new data. It was concluded in the SID, which is a public document, that a supplement to the EIS was not needed.

The district court granted summary judgment to the federal government on this issue, holding that:

> the decision of the Department of Interior not to file a supplement or to revise the existing EIS in the few days remaining before publication is not unreasonable.

520 F. Supp. at 1383. We affirm.

The district court in its analysis focused on the adequacy of the initial EIS. 520 F. Supp. at 1382, *quoting Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 592 (9th Cir. 1981). While we agree that the initial EIS was adequate, new information may require its supplementation. *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017 (9th Cir. 1980). A federal agency has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions, even after release of an EIS. *Id.* at 1023-24. Guidelines of the Council on Environmental Quality require that agencies:

> (1) Shall prepare supplements to either draft or final environmental impact statements if:
>
> * * *
>
> (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

40 C.F.R. § 1502.9(c).

An agency's decision not to supplement an EIS will be upheld if it was reasonable. *Warm Springs Dam*, *supra*, at 1024. Reasonableness depends on the environmental significance of the new information, the probable accuracy of the information, the degree of care with which the agency con-

sidered the information and evaluated its impact, and the degree to which the agency supported its decision not to supplement with a statement of explanation or additional data. *Id.* We hold that the decision of the BLM not to supplement the EIS for Lease Sale 53 was not unreasonable.

Whether the revisions to the estimates of oil reserves will change the environmental impact of Lease Sale 53 significantly is problematic. The accuracy of the data is open to question, given the inherently speculative nature of oil reserve estimates. Also, the qualitative impacts on the environment possibly could be the same under either set of estimates. In fact, in the SID only a small quantitative increase in impact was estimated. We acknowledge being influenced by the fact that additional Environmental Impact Statements will be required at the later exploration, production, and development stages, and these will, of course, be based on the latest reserve estimates available at the time they are prepared.

The revised estimates of oil and gas reserves were made available to the public as an addendum to the EIS, and environmental impact estimates using the new data were made public in the SID. While a SID cannot substitute for a supplemental EIS was unnecessary. The SID also provides a detailed explanation for the Secretary of Interior's decision not to supplement. While the Addendum and SID did not go through the public comment process, that process is not essential every time new information comes to light after an EIS is prepared. Were we hold ohterwise, the threshold decision not to supplement an EIS would become as burdensome as preparing the supplemental EIS itself, and the continuing duty to gather and evaluate new information, *Warm Springs Dam*, *supra*, at 1023, could prolong NEPA review beyond reasonable limits.

The district court did not err in its conclusion with respect to the NEPA issue.

VI.

OUTER CONTINENTAL SHELF LANDS ACT

Section 19 of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1345, provides, as already noted,

that the governor of an affected state may submit recommendations to the Secretary of Interior regarding the size, timing, or location of a proposed lease sale. 43 U.S.C. § 1345(a). The Secretary is required to accept the governor's recommendations "if he determines . . . that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State." 43 U.S.C. 1345(c). The statute provides that the Secretary's acceptance or rejection of such recommendations shall be final, "unless found to be arbitrary or capricious." 43 U.S.C. § 1345(d). *See, e.g., Ethyl Corp. v. EPA*, 176 U.S. App. D.C. 373, 541 F.2d 1 (D.C. Cir. 1976).

California claims that Governor Brown's recommendations provided for a reasonable balance between national and state interests, and thus that the Secretary's failure to accept the Governor's recommendations was arbitrary and capricious. California also contends that the Secretary violated certain procedural requirements of Section 19.

As the district court properly noted, the scope of our review is limited. In determining whether the Secretary's rejection of the Governor's recommendations was arbitrary or capricious, we must consider whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), *quoted in Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); *Washington State Farm Bureau v. Marshall*, 625 F.2d 296, 302 (9th Cir. 1980). Additionally, we must consider whether the Secretary "articulate[d] a rational connection between the facts found and the choice made." *Bowman Transportation, Inc., supra*, at 285, and whether the Secretary made the decision in accordance with his duty under law. *American Petroleum Institute v. Knecht*, 456 F. Supp. 889, 904-05, *aff'd*, 609 F.2d 1306 (9th Cir. 1979). The court may not substitute its judgment for that of the agency.

The district court, while not impressed with the spirit with which the Secretary dealt with the Section 19 requirements, held that, giving due deference to his judgment, the Secretary's decision to reject Governor Brown's recommen-

dations was not legally "arbitrary and capricious." 520 F. Supp. 1385-86. We agree.

The Secretary did analyze factors weighing in the balance of interests, and described this analysis in a letter mailed to Governor Brown on May 1, 1981. As the district court noted, the OCSLA provides little or no guidance as to the proper basis for the Secretary's evaluation of a governor's recommendation. It provides that the Secretary must determine whether the governor's recommendation draws a "reasonable balance" between two key factors—the "national interest" and the "well-being of the citizens of the affected State." 43 U.S.C. § 1345(c). The statute requires that the determination of the "national interest" encompass "the desirability of obtaining oil and gas supplies in a balanced manner," but does not attempt to define the factors relevant to the citizens' well-being. *Id.*

The Secretary evaluated such "quantifiable factors" as income from resource development and expected monetary losses due to oil spills, and such "not quantifiable" factors as damage to wildlife, decline in water quality, and "aesthetic and lifestyle losses." 520 F. Supp. 1384. We agree with the district court that the Secretary gave some consideration to the relevant factors and his decision cannot be said to be arbitrary or capricious.

California also claims that the Secretary failed to comply with the procedural requirements of section 19 by not providing sufficient opportunity for the Governor in writing his reasons for rejecting the recommendation. 43 U.S.C. § 1345(c).

The statute requires that the Secretary in making the decision to accept or reject the recommendation provide the Governor "the *opportunity* for consultation." 43 U.S.C. § 1345(c) (emphasis added). We agree with the district court that the Secretary's consultation with Governor Brown was adequate to meet the technical requirements of the statute. 520 F. Supp. 1385. The statute also requires the Secretary to "communicate to the Governor, in writing, the reasons for his determination to accept or reject such Governor's recommendations." 43 U.S.C. § 1345(c). We also agree with the court below that the Secretary's explan-

atory letter to the Governor satisfied this requirement, and that the timing of the letter—after announcement of his decision to go ahead with the lease sale and two days after suit was filed on this matter in district court—does not render it ineffective in fulfilling the statutory requirement. 520 F. Supp. 1385.

Having concluded that the Secretary complied with the procedural requirements of Section 19 of the OCSLA and that his decision to reject Governor Brown's recommendation was not arbitrary or capricious, we affirm the district court's grant of summary judgment to appellants on this issue.

VII.

STANDING OF ENVIRONMENTAL GROUPS

The Natural Resources Defense Council, Inc., The Environmental Defense Fund, and various other environmental organizations sought standing to raise the CZMA issues raised by the State of California and the local governments. The district court denied them standing because the CZMA was not enacted for their "especial benefit," and treated the briefs of these parties as amici curiae.[4] Citing two recent Supreme Court cases, *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981); and *California v. Sierra Club*, 451 U.S. 287 (1981), the district judge held that these environmental groups had no implied right of action to bring claims under the CZMA. Assuming, *arguendo*, this holding is correct, it does not resolve the standing issue.

The environmental groups rely for standing not on an implied right of action under the CZMA, but on Section 10 of the Administrative Procedure Act (APA), 5 U.S.C. § 702. Addressing this point, the district court held that they may not rely on the APA as the sole jurisdictional predicate. In this the district court erred. The environmental groups relied on the APA for standing, not for federal subject mat-

[4] The district court dismissed the environmental groups and their claims from the lawsuit in a separate order of dismissal. NRDC v. Watt, No. 81-2081 (C.D. Cal. Aug. 18, 1981) (order of dismissal).

ter jurisdiction. We hold that the environmental groups have standing under 5 U.S.C. § 702. No remand is necessary, however, because the erroneous denial of standing did not affect the outcome of the case.

We first note that federal court jurisdiction is based on 28 U.S.C. § 1331, for civil actions arising under the laws of the United States, and is not at issue in this case. Second, an implied right of action under the statute violated is not a necessary predicate to a right to action under the APA. *Chrysler Corp. v. Brown*, 441 U.S. 281, 317 (1979); *Glacier Park Foundation v. Watt*, 663 F.2d 882, 885 (9th Cir. 1981).

Section 10 of the APA, 5 U.S.C. § 702 provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

To have standing under this section both of the following questions must be answered affirmatively:

1. Has the party seeking standing suffered a legal wrong, or been adversely affected or aggrieved by the agency action (*i.e.*, has he been "injured in fact"), and,

2. Are the interests sought to be protected by the party seeking standing "arguably within the zone of interests to be protected or regulated" by the statute in question.

See Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 151-53 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970); *Glacier Park Foundation v. Watt*, *supra*, at 885.

A mere assertion of organizational interest in a problem, unaccompanied by allegations of actual injury to members of the organization, is not enough to establish standing. *Sierra Club v. Morton*, 405 U.S. 727 (1971); *Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc.*, ___ U.S. ___, 102 S.Ct. 752 (1982). Here, however, actual injuries to members have been alleged. The environmental groups claim that various of their members live, work, and enjoy recreational activities in the areas that will be affected by leasing of OCS tracts. They allege that their members' use of the coast and

waters for commercial and sport fishing, scientific research, tourist activities, and recreation is threatened by OCS leasing. Injuries of a noneconomic nature to widely-shared aesthetic and environmental interests, as well as economic injuries, can amount to sufficient "injury in fact" for standing under section 10. *Sierra Club v. Morton*, 405 U.S. at 734, *cited with approval in United States v. SCRAP*, 412 U.S. 669, 686 (1973); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970); *Cady v. Morton*, 527 F.2d 786 (9th Cir. 1975). Thus, the environmental groups' allegations establish sufficient "injury in fact" to permit an affirmative answer to the first question.

We also find that the alleged injuries are within the "zone of interests" to be protected by Section 307(c) of the CZMA. As already pointed out, section 307(c)(1) is part of a Congressional scheme to carry out the overall purpose of the CZMA, which is to protect the very resources the environmental groups claim are threatened. Congressional findings underlying the CZMA recognize "a national interest in the effective management [and] protection " of the coastal zone as well as in its development and beneficial use. Section 302(a), 16 U.S.C. § 1451(a). Congress expressed concern over the "loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion" that has been "occasioned by population growth and economic development, including . . . extraction of mineral resources and fossil fuels." 16 U.S.C. § 1451(c). We agree with the finding in *American Petroleum Institute v. Knecht*, 456 F. Supp. 889 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979), that "[a]lthough sensitive to balancing competing interests, [the CZMA] was first and foremost a statute directed to and solicitous of environmental concerns." 456 F. Supp. at 919. Thus, the allegations of the environmental groups permit an affirmative answer also to the second question.

The CZMA issues the environmental groups sought to raise were identical to those raised by the State of California and the local governments, parties who clearly had standing. Additionally, amici curiae briefs were filed by the

parties wrongly denied standing. Our review of the more than one thousand pages of the eighteen briefs filed in this case, as well as the extensive argument and our own research, convince us that no stone was left unturned in presenting all aspects of the CZMA issue to this court. Allowing additional parties to present the same arguments would not affect the outcome of this case. Therefore, to remand the case for additional proceedings because of the district court's error with respect to standing would constitute a waste of scarce judicial resources.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND STAYED IN PART.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 81-2080 MRP

STATE OF CALIFORNIA, ET AL., PLAINTIFFS

v.

JAMES G. WATT, ET AL., DEFENDANTS.

CASE NO. CV 81-2081 MRP

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL., PLAINTIFFS,

v.

JAMES G. WATT, ET AL., DEFENDANTS.

FILED AUG. 18, 1981

OPINION

I. BACKGROUND

Plaintiffs in this case are the State of California, the California Coastal Commission (hereinafter referred to as "CCC"), the California Air Resources Board, the California Resources Agency, the California Department of Fish and Game, the California Department of Conservation. (This case is hereinafter referred to as *California v. Watt.*) The Natural Resources Defense Council, Inc. (hereinafter referred to as "NRDC"), the Sierra Club, the Friends of the Earth, the Friends of the Sea Otter, and the Environmental Coalition on Lease Sale 53 (hereinafter collectively referred to as "environmental groups") are plaintiffs in the companion case. The plaintiffs in the companion case are associations who claim an interest in the coastal zone and its resources. (The companion case hereinafter referred to as *NRDC v. Watt.*)

Intervening as plaintiffs in the case of *California v. Watt* are certain cities and counties of the State of Claifornia

which are located on, or in proximity to, the California coast. The plaintiff-intervenors are County of Humboldt, County of Marin, County of Mendocino, County of Monterey, County of San Diego, County of San Luis Obispo, County of San Mateo, County of Santa Barbara, County of Santa Clara, County of Santa Cruz, County of Sonoma, City of Brisbane, City of Los Angeles, City of San Luis Obispo, City of Santa Monica, and City of Seaside (collectively referred to as "local governments").

The defendants are James G. Watt (the "Secretary"), acting in his official capacity as Secretary of the Interior, the Department of Interior, Robert Burford, acting in his official capacity as Director of the Bureau of Land Management, and the Bureau of Land Management ("BLM").

Intervening as defendants in both actions are Western Oil and Gas Association ("WOGA"), Amoco Production Company, Atlantic Richfield Company, Cities Service Company, Conoco, Inc., Exxon Corporation, Elf Aquitaine Oil and Gas, Getty Oil Company, Gulf Oil Corporation, Phillips Petroleum Company, and Shell Oil Company. WOGA is a regional trade association of companies and individuals in the petroleum industry. The remaining defendant-intervenors are oil companies which submitted high bids on one or more tracts offered in Lease Sale No. 53 on May 28, 1981.

Lease Sale No. 53 consists of a maximum offering of 243 designated tracts of the Outer Continental Shelf ("OCS") for mineral development. The tracts in Lease Sale No. 53 lie in five different basins off the coast of California—one of which is the Santa Maria Basin. That basin extends generally from Point Sur in Monterey County in the north to Point conception in Santa Barbara County in the south.

Requesting injunctive and declaratory relief, plaintiffs claim that defendants have violated five federal statutes in offering for competitive bidding certain oil and gas leases on tracts located in the Santa Maria Basin. This Court has jurisdiction over the claims asserted herein pursuant to 28 U.S.C. § 1331 (Federal question jurisdiction); 28 U.S.C. §§ 2201-2202 (Declaratory Judgment Act); 28 U.S.C. § 1361 (Mandamus); 5 U.S.C. §§ 701-706 (Administrative Procedure Act); 43 U.S.C. §§ 1349(a)(1), (b)(1) of the Outer

Continental Shelf Lands Act ("OCSLA"); the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451 *et seq.*; the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*; the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(a)(1), (b)(1); and the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 *et seq.*

There are no material issues of genuine fact in dispute in these two consolidated cases.

The following is a chronology of the events relating to the lease sale at issue in the two cases.

In November 1977, BLM issued a Call for Nominations for Lease Sale No. 53. The Call requested the petroleum industry to designate specific tracts on which it was interested in bidding if a sale were held. It also asked federal, state and local governments, universities, environmental organizations, research institutions, and the public to identify specific tracts which they believe should be excluded from leasing or should be leased under particular restrictions due to conflicting resource values or environmental factors.

In October 1978, the Department of Interior announced the tentative tract selection for Lease Sale No. 53. The Santa Maria Basin contained 115 of the 243 tracts to be involved in the sale.[1]

A draft environmental impact statement ("DEIS") was released for public comment in April 1980. The DEIS, which analyzed the environmental impacts in the five basins to be included in Lease Sale No. 53, was based on a resource estimate of 404 million barrels for the Santa Maria Basin.

On July 8, 1980, the California Coastal Commission requested that the Secretary submit a consistency determination at the time of the issuance of the proposed notice of sale.

In September 1980, a final environmental impact statement (the "EIS") was released. Shortly before its publication, on or about August 28, 1980, the United states Geo-

[1] Although 243 tracts were originally to be considered for proposed Lease Sale No. 53, BLM later established that the total sale area would involve 242 tracts comprising 1.315 million acres.

logical Survey ("USGS") made available revised resource estimates for the Santa Maria Basin in the amount of 794 million barrels of oil. The revised estimate, which almost doubled the previous estimate, was incorporated in an addendum to the EIS.

Also during the fall of 1980, BLM consulted with the National Marine Fisheries Service ("NMFS") and the Fish and Wildlife Service ("FWS") concerning the jeopardy posed to any endangered or threatened species by Lease Sale No. 53. The NMFS rendered a biological opinion that Lease Sale No. 53 would not jeopardize the endangered gray whale. The FWS rendered a biological opinion that the sale would not jeopardize the threatened sea otter.

During this period, a Secretary Issue Document ("SID") was prepared by the Department of Interior. An SID is an internal document intended to aid the Secretary in making decisions concerning lease sales. The Department of Interior released the SID for Lease Sale No. 53 in October 1980.

On October 16, 1980, former Secretary of the Interior Cecil D. Andrus issued the proposed notice of sale for Lease Sale No. 53. The notice proposed leasing only within the Santa Maria Basin. Secretary Andrus deleted the four other basins from the proposed sale.

By letter of October 22, 1980, the Department of Interior notified the CCC of its "negative determination" that the preleasing activities associated with Lease Sale No. 53 had no "direct effects" on California's coastal zone. In response to the negative determination, on December 16, 1980, the CCC adopted a resolution that the deletion of 31 tracts (29 tracts in the final notice of sale) in the northern portion of the Santa Maria Basin was necessary in order for Lease Sale No. 53 to be consistent with the California Coastal Management Plan ("CCMP"). (As 4 of the tracts were combined as 2 for sale purposes, the CCC resolution is actually directed to 29 tracts.)

On December 24, 1980, the Governor of California, Edmund G. Brown, Jr., responding to Secretary Andrus' proposed notice of sale, recommended the deletion of 34 tracts located in the northern portion of the Santa Maria Basin. (Although the recommendation referred to 34 tracts,

4 of the tracts were combined as 2 tracts for sale purposes; therefore, only 32 tracts were actually encompassed by the Governor's recommendation.) Governor Brown's letter and enclosed recommendations were subsequently transmitted to the new Secretary of the Interior Watt by a memorandum from Deputy Assistant Secretary Heather L. Ross.

On February 10, 1981, Secretary Watt issued a revised proposed notice of sale for Lease Sale No. 53. The four basins previously deleted from the proposed sale were once more included in the sale. The revised notice continued to propose leasing in the Santa Maria Basin. In transmitting the revised proposed notice to Governor Brown, Secretary Watt requested recommendations pursuant to § 19 of OCSLA, 43 U.S.C. § 1345.

By letter dated April 7, 1981, Governor Brown submitted his recommendations concerning the revised Lease Sale No. 53. He reiterated his position that, based upon the balancing test of § 19 of OCSLA, the northern 32 tracts should be deleted from the sale. Enclosed with the letter detailing Governor Brown's recommendations were comments and recommendations from various state agencies and local governments in California.

On April 10, 1981, the Department of Interior issued a news release in which Secretary Watt announced that he planned to divide Lease Sale No. 53 into two sales, with the sale of the tracts in the Santa Maria Basin to be held in May 1981 and the sale of the remaining tracts to be postponed. The Secretary stated that his decision to lease the entire Santa Maria Basin was based on a finding of overriding national interest. The final notice of sale for Lease Sale No. 53, Santa Maria Basin, was published on April 27, 1981.

By letter dated May 1, 1981, Secretary Watt notified Governor Brown of the rejection of California's recommendations concerning the lease sale in the Santa Maria Basin. In the communication sent to Governor Brown, Secretary Watt provided a brief explanation of the basin for his previous rejection of the recommendation.

Between the Call for Nominations on OCS Lease Sale No. 53 in November 1977 and May 1, 1981, the State of

California, its agencies and the local governments submitted to the Department of Interior more than 20 separate communications seeking the deletion or delay of the sale of tracts in the Santa Maria Basin. Excluding the call for nominations and the letter of May 1, the Department of Interior submitted at least three separate communications to the state or to the CCC in regard to the disputed tracts within Lease Sale No. 53.

On April 29, 1981, plaintiffs in *California v. Watt* and in the companion case of *NRDC v. Watt* filed this action. On May 27, 1981, the Court granted a preliminary injunction in *California v. Watt*. Subsequently, on July 10, 1981, the consolidated cases came on for hearing on cross motions for summary judgment.

With respect to the CZMA, 29 tracts in the northern portion of the Santa Maria Basin are at issue. (Due to the consolidation of 4 tracts into 2, the 31 tracts, as initially identified by Secretary Andrus in the October 1980 notice of sale, were viewed as 29 tracts at the time of the April 1981 final notice of sale.) The 29 tracts, numbered 129 to 155 and 158 to 161, range seaward from 3 miles to approximately 24 miles and lie in an area in which the water depths range from 50 to 750 meters (162 to 2,437 feet). *See* Administrative Record No. 511w (U.S. Dept. of Interior, BLM Memorandum, June 4, 1981 at 3); Environmental Impact Statement ("EIS"), Vol. 1 at 1-9. Tract numbers 130, 131, 133, 134, 136 to 138, 140 to 151, 153 to 155, 160 and 161 are within 12 miles of the coastline. *See* Defendant's Exhibit L-G at 289-90 (letter from the State of California's Department of Fish and Game to the Resources Agency of the State of California). Administrative Record No. 511w (U.S. Dept. of Interior, BLM Memorandum, June 4, 1981 at 3); Administrative Record No. 411w (California Coastal Comm. Letter, April 8, 1981 at 2); Administrative Record No. 165w (CCC comments on the Draft Environmental Impact Statement ("DEIS") on Proposed OCS Lease Sale #53, June 4, 1980 at 2); Administrative Record No. 158w (U.S. Dept. of Interior, BLM Press Release, May 9, 1980); EIS at 1-10. Of these tracts, numbers 138, 142, 143, 146, 147 and 151 are within 6 miles of the shore, EIS at 2-18;

SID at 73; portions of tract numbers 130, 131, 134, 137, 141, 144, 145, 149, 150, 154, 155, 160 and 161 are within 6 nautical miles of the shore, EIS at 2-18, 2-19; Defendant's Exhibit L-G at 292-93.; letter from the Department of Parks and Recreation to the U.S. Dept. of Interior, Office of Planning and Research. The remaining tracts, numbers 129, 132, 135, 139, 148, 152, 158 and 159 range seaward from approximately 12.5 to 24 miles. *See* Administrative Record No. 511w (U.S. Dept. of Interior BLM Memorandum, June 4, 1981 at 3).

With respect to the other statutes, NEPA, OCSLA, ESA and MMPA, three additional tracts are in dispute. They are numbered 162 to 164. They also range seaward from 3 miles to approximately 24 miles and lie in an area in which the water depths range from 50 to 750 meters (162 to 2,437 feet). Administrative Record No. 511 (U.S. Dept. of Interior, BLM Memorandum, June 4, 1981 at 3); EIS, Vol. 1 at 1-9.

II. THE COASTAL ZONE MANAGEMENT ACT

A. The Issue Presented

Plaintiffs in this case contend that the Final Notice of Lease Sale No. 53 "directly affects" the California coastal zone and, therefore, the Secretary of the Interior must conduct the pre-lease activities relating to Lease Sale No. 53 in a manner which is, "to the maximum extent practicable", consistent with the California Coastal Management Program (CCMP), pursuant to § 307(c)(1) of the CZMA. 16 U.S.C. § 1456(c)(1). Thus, the principal issue in this case with respect to the CZMA is whether the Secretary violated that Act by making a "negative determination" that no consistency review was required for the Final Notice of Lease Sale No. 53. *Id.*; 15 C.F.R. §§ 930.34-.35.

The threshold test for the application of § 307(c)(1) is whether the activity in question will have a "direct effect" on the coastal zone. If a federal agency determines that its proposed activity *will not* directly affect the state's coastal zone, it must provide the administrator of the state coastal program with written notice briefly setting forth the reasons for that conclusion. 15 C.F.R. § 930.35(d) (1980). That

notice is called a "negative determination". *Id.* On the other hand, if a federal agency determines that the activity in question *will* directly affect the coastal zone, the federal agency must provide the administrator of the state coastal program with a written notice; called a "consistency determination", that the activity will be carried out in a manner which conforms with the state program. 15 C.F.R. § 930.34(a) (1980).

The issue is squarely presented in this case of first impression: does the Final Notice of Sale with respect to the 29 tracts in the northern portion of the Santa Maria Basin directly affect the coastal zone of the State of California? The resolution of this issue turns on an interpretation of the phrase "directly affect" as it is used in the CZMA.

Established rules of statutory construction require that the Court turn first to the "language in which the act is framed, and if that is plain, . . . to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). If the meaning of the statutory text is clear and unambiguous, the Court's task is minimal. That is not the case here as the language of § 307(c)(1) is neither clear nor ambiguous.[2] The Act itself provides no definition of the key terms employed in the section. Thus, in order to construe and interpret § 307(c)(1), the Court is required to turn to the Act's stated purposes, the legislative history, and the interpretations of agencies charged with administering the Act.

B. The Statutory Purpose

Effectuating the purpose of a statute should be a primary concern of a court in construing the meaning of disputed language within it. *Philbrook v. Glodgett*, 421 U.S. 707,

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[2] During the 1980 Oversight Hearings held before the House Subcommittee on Oceanography, Chairman Gerry E. Studds remarked, "I think particularly that sections 307 and 308 challenge anyone whose native tongue is English to discern what Congress had in mind when it wrote those sections". Proposed Amendments to the CZMA: Hearings on H.R. 6956 and H.R. 6979 before the Subcommittee on Oceanography of the House Committee on Merchant Marine & Fisheries, 96th Cong., 1st and 2d Sess. 88 (1980).

713 (1975), quoting *United States v. Heirs of Boisdor 'e*, 8 How. 113, 122 (1849). Further, a court should not ignore policy considerations in favor of mechanical interpretation in seeking the proper construction of a statute. *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1280 (9th Cir. 1980), citing to *United States v. Anderson*, 76 U.S. 56, 65-66 (1869). Thus, the question of which activities fall within the scope of 307(c)(1) must be considered in light of the statutory purpose of the CZMA.

The CZMA was enacted in order to provide comprehensive, coordinated planning for the protection and beneficial use of the resources of the coastal zone. 16 U.S.C. §§ 1451, 1452. Special emphasis was placed on the objective of preserving the natural resources within this area "for this and succeeding generations". 16 U.S.C. § 1452(1). In enacting the CZMA, Congress intended to establish an effective scheme for the long-term management of the valuable resources found within the coastal zone of the United States.

The "key" to the management scheme envisioned by Congress is "to encourage the states to exercise their full authority over the lands and waters in the coastal zone". 16 U.S.C. § 1451(i). This authority granted to the states is to be exercised "in cooperation with Federal and local governments and other vitally affected interests". *Id.* Thus, the primary authority in the management scheme is to be bestowed upon those coastal states which develop and implement comprehensive management programs for their respective coastal areas.

While the Act assigns final responsibility for management to states with such a program, the federal agencies are given significant power over the policy choices which a state incorporates into its coastal management plan. Under the Act, the Secretary of Commerce may not give the required approval to the State's proposed plan "unless the views of Federal agencies principally affected by such program have been adequately considered". 16 U.S.C. § 1456(b). Another prerequisite for the approval of the Secretary of Commerce is finding that the state's program

"provides for adequate consideration of the national interest". 16 U.S.C. § 1455(c)(8).

To induce the states to develop and implement comprehensive management programs in accord with the views of federal agencies, Congress provided that federal activities are to be consistent with the approved state management program.[3] To this end, Congress designated five categories of federal actions which are subject to the requirement of a consistency review.

The consistency provisions under the CZMA, each subjecting particular categories of federal actions to review, are: (1) federal activities, conducted or supported by a federal agency, which directly affect the coastal zone; (2) federal development projects in the coastal zone; (3) activities of applicants for federal licenses or permits where the proposed activities will affect land and water uses in the coastal zone; (4) OSC post-lease sale activities which require a federal license or permit and will affect any land use or water use in the coastal zone; and (5) federal programs which provide funding to state and local governments for projects which will affect the coastal zone §§ 307(c)-(d), 16 U.S.C. §§ 1456(c)-1456(d). Administrative procedures have been established to facilitate the implementation of the consistency requirements under the Act.[4]

Obviously, one incentive for state participation in a federal coastal management program is the federal funding for the program. 16 U.S.C. §§ 1454, 1455. The grants, however, are of limited duration. Thus, in reality, the requirement of consistency review is the principal permanent in-

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[3] Linsley, Federal Consistency and Outer Continental Shelf Oil and Gas Leasing, 9 Boston C. Envt'l. Affairs L. Rev. 429, 433 (1981).

[4] The federal agency makes an initial determination whether its activity "directly affects" the coastal zone. 15 C.F.R. § 930.33(a) (1980). The federal agency must evaluate its activity in light of the provisions of the state's coastal management program. 43 Fed. Reg. 43,590 (1977). If the federal agency determines that the activity will directly affect the coastal zone, it must provide the state with a "negative determination". *Id.* § 930.35(d). Mediation is available in the event that the federal agency and the state disagree as to the propriety of a negative determination or the validity of a consistency determination. *Id.* §§ 930.110-115. *See Linsley, supra*, 438-440.

ducement to the state's development of a coastal management plan. There is therefore a *quid pro quo* in the legislative scheme[5]; the state agencies are to participate actively in designing the state management program, and, in return, the federal agencies "*shall* conduct" their activities "in a manner which is, to the maximum extent possible, consistent" with the state's program 16 U.S.C. § 1456(c) (emphasis added).

The management program created under the CZMA is intended to be comprehensive. Congress intended that federal-state consultation procedures extend to all phases of the management of coastal resources. To be considered during consultation are such issues as the orderly siting of energy facilities, including pipelines, oil and gas platforms, and crew and supply bases, and the minimization of geological hazards. 16 U.S.C. §§ 1452(2)(B)-(C), 1453(6). Directing the coastal states to identify potential problems with respect to marine and coastal areas and to prevent unavoidable losses of any valuable environmental or recreational resource as a result of "ocean energy activities", Congress intended that the states be involved at the initial stages of decision-making related to the coastal zone. 16 U.S.C. §§ 1456a(c)(3); 1456b(a). The Act requires that the coastal state's management program include a "planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including, but not limited to, a process for *anticipating and managing* impacts from such facilities". § 1454(b)(8) (emphasis added). In order to anticipate impacts and prevent unnecessary losses in the coastal zone, it is manifest that the consultation process was intended to begin at the earliest possible time.

Any interpretation of the phrase "directly affect" must give due consideration to the reciprocal roles intended to be assigned to federal agencies and to the states. The states are intended to have a significant role in essential planning and coordination for the development of the coastal zone.

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[5] Schoenbaum & Parker, Federalism in the Coastal Zone, 57 N.C. L. Rev. 231, 239 (1979).

They are intended to be involved in every stage of the planning from drawing board to execution.

Special grants are offered to induce the states to create federally-approved comprehensive management plans which provide for inter-governmental cooperation. California designed and created such a plan.[6] It would be anomalous to impute to the Congress which induced the states to formulate these plans an intention to permit the federal government to proceed with critical decision-making in total disregard of them. Congress can hardly have had such an intent. The CZMA was purposely designed to encourage cooperation between federal, state and local governments rather than conflict, and it should be construed in a manner which will effectuate that purpose.

Pre-leasing activities, including the call for nominations, the publication and circulation of an environmental impact statement, and the publication of a final notice of lease sale, define and establish the basic parameters for subsequent development and production. During the pre-leasing stage, which culminates in the final notice of lease sale, critical decisions are made as to the size and location of the tracts, the timing of the sale and the stipulations to which the leases are subject.[7] Each of these are key Outer Continental Shelf (hereinafter referred to as the OCS) planning decisions. The selection of tracts to be let determines where the lessee can explore and produce oil and gas. The decision to offer or delete various tracts also determines which estuaries, reefs, wetlands, beaches, or barrier islands are exposed to the risk of oil spills and which are not. The particular stipulations imposed on the lessors, along with the designated location of the tracts, influence the flow of vessel traffic, the placement of platforms and drilling structures, as well as the siting of on-shore construction. Stipulations

[6] The California Coastal Management Program ("CCMP") is the program adopted by California pursuant to the CZMA. *See American Petroleum Institute v. Knecht*, 456 F. Supp. 889 (C.D. Cal. 1978).

[7] Absent special circumstances, no tract leased on the OCS is to exceed 5,760 acres. 43 U.S.C. § 1337(b)(1). The lessee is entitled to explore, develop and produce the oil and gas found within the area of that tract.

included in the lease determine what equipment is to be used and what training is to be provided by lessees to those working on the tracts. In addition, decisions made during the pre-leasing stage establish the timing of OCS development and production.[8] Thus, the leasing sets in motion the entire chain of events which culminates in oil and gas development.

The purpose of the act would be not be furthered by excluding the states from the critical decision-making relating to oil and gas resources in the OCS. If the state is consulted only after the plans are drawn and the parameters for exploration and development are set, as a practical matter, it will be relegated to the defensive role of objecting to the proposals of individual lessees as they are presented. Thus, the comprehensive planning in accordance with the management plan cannot occur and there will be no opportunity for the orderly decision-making envisioned by the draftsmen of the CZMA.

C. The Legislative History of the CZMA

The legislative history, while somewhat inconclusive, sheds some light on the Congressional intent in enacting this provision. As the Act was first passed in 1972, amended in 1976 and in 1980, Congress has had ample opportunity to debate the legislation. The text of § 307(c)(1) in the original bill, as passed by both House and Senate, provided that all federal activities "in the coastal zone" were subject to § 307(c)(1). Without explanation, the Conference Committee altered the language and substituted the phrase "directly affecting the coastal zone" for "in the coastal zone". On balance, this substitution seems to have been intended to expand the scope of the provision. Activities occurring outside of the coastal zone, such as OCS activities, as well as activities within the coastal zone, were made subject to consistency review. A caveat, however,

[8] The original lease is valid for a period of 5 to 10 years. 43 U.S.C. § 1337(b)(2).

was appended to the revision. In order to be subject to consistency review, the effect must be "direct". The 1972 legislative history is silent as to the import of this change.

In 1976 Congress amended the CZMA. Coastal Zone Management Act Amendments of 1976, Pub.L.No. 94-370, 90 Stat. 1013 (1976) (amending 16 U.S.C. §§ 1451-1464). Section 307(c)(1) was not amended, and the legislative history of the 1976 amendments does not address this particular provision. However, there are references within the legislative history to the question of the applicability of consistency requirements to the decision to lease. Certain statements relate to the purpose of the Act as a whole. The Senate Report expressed concern that "[t]here is very little coordination or communciation between Federal agencies and the affected coastal states prior to major energy resource development decisions, such as the decision to lease large tracts of the OCS for oil and gas.... Full implementation of the Coastal Zone Management Act of 1972 ... could go far to institute the broad objectives of Federal-State cooperative planning envisioned by the framers of the act". S. Rep. No. 94-277, 94th Cong., 2d Sess. 3, *reprinted in* [1976] U.S. Code Cong. & Ad. News 1770.

During its consideration of the 1976 Amendments, Congress did address a different subsection within the same section of the 1972 Act—307(c)(3), now § 307(c)(3)(A). That subsection requires that applicants for a federal permit or license for an activity affecting the coastal zone include in the application a certification of consistency of the proposed activity with the state's coastal management program. Both the House and the Senate concluded that Congress had intended that the "consistency clause" (i.e., § 307(c)(3)) in the 1972 act apply to Federal leases for offshore oil and gas. S. Rep. No. 94-277, *supra*, 19-20, 36-37, 53-54, 59; H.R. Rep. No. 94-878, 94th Cong., 2d Sess. 4, 52-53, 67-68. Nevertheless, by amendment on the floor of the House, the explicit requirement of consistency certification for offshore leasing was deleted from § 307(c)(3). 122 Cong. Rec. 6128. The final version of § 307(c)(3) imposed no consistency certification requirement on the lessee.

Defendants infer from the Congressional decision to exclude leasing from the consistency certification process under § 307(c)(3) an intention to exclude pre-leasing activities from all consistency review. They assert that § 307(c)(3) supersedes § 307(c)(1). Thus, defendants read the Congressional silence as to the continuing validity of § 307(c)(1) as a repeal by implication.

The Supreme Court has consistently applied the "cardinal rule ... that repeals by implication are not favored". *Morton v. Mancari*, 417 U.S. 535, 549-551 (1974); *Wood v. United States*, 16 Pet. 342-343, 363 (1842). In the absence of an affirmative showing of an intention to repeal, effect must be given to each section of the statute. *Id.* Where there is no "positive repugnancy" between the two provisions, the subsequently enacted provision does not repeal the previously enacted provision. *United States v. Borden Co.*, 308 U.S. 188, 198-99 (1939).

There is no "repugnancy" between § 307(c)(1) and 307(c)(3). The former subsection imposes obligations on the federal government which in the present context is the lessor, whereas the latter subsection imposes obligations on private sector applicants for a federal license or permit, which in the present context are the lessees. Certainly the legislative history for the 1976 Amendments does not imply any intention to make § 307(c)(3) the exclusive mode of invoking consistency review. Under § 307(c)(3), consistency requirements are imposed on the specific activities relating to permits and licenses, whereas under § 307(c)(1), consistency requirements are imposed on a residual category of federal actions which are neither development projects nor related to permits and licenses. 15 C.F.R. § 930.31 (1980); *see* 44 Fed. Reg. 37,146 (1979) (NOAA's comment to 15 C.F.R. § 930.31 (1979)).

In 1980, Congress reauthorized the CZMA. Coastal Zone Management Improvement Act of 1980, Pub. L. 96-464, 94 Stat. 2060 (1980). Congress amended certain sections of the Act, but did not alter any of the section 307 consistency provisions. Both the House and Senate Committees acknowledged the existence of a disagreement over the applicability of the consistency provisions to the final notice of

OSC lease sale.[9] In order to clarify the intent of these provisions, the House Committee explained in its report accompanying the 1980 amendments that the 1976 amendments to § 307 "did not alter Federal agency responsibility to provide States with a consistency determination related to OCS decisions which preceded issuance of leases."[10] H.R. Rep. No. 96-1012, 96th Cong., 2d Sess. 28, *reprinted in* [1980] U.S. Code Cong. & Ad. News 4376. The Senate Committee specifically discussed the relationship between section 307(c)(1) and OCS pre-lease activities:

> The Department of the Interior's activities which preceded lease sales were to remain subject to the requirements of section 307(c)(1). As a result, intergovernmental coordination for purposes of OCS development commences at the earliest practicable time in the opinion of the Committee, as the Department of the Interior sets in motion a series of events which have consequences in the coastal zone.

S. Rep. No. 783, 96th Cong. 2d Sess. 11 (1980).

The 1980 Congress also recognized the uncertainty that had arisen concerning the interpretation of the threshold test of "directly affecting" the coastal zone. H.R. Rep. No. 96-1112, 96th Cong., 2d Sess. 34-35, *reprinted in* [1980] U.S. Code Cong. & Ad. News 4382-83. Referring to earlier congressional deliberations, the House Committee presented two alternative definitions of the phrase "directly

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[9] "The committee is cognizant of one disagreement between California and the Department of Interior which led to a resolution effort through formal mediation proceedings conducted by the Department of Commerce". H. Rep. R. No. 96-1012, 96th Cong., 2d Sess. 34, *reprinted in* [1980] U.S. Code Cong. & Ad. News 4382. *See also* S. Rep. No. 96-783, 96th Cong., 2d Sess. 11.

[10] There was no conference report on the Coastal Zone Management Improvement Act of 1980. After the language of the Senate bill was amended to contain the text of the House bill, the Senate bill was passed in lieu of the House bill. [1980] U.S. Code Cong. & Ad. News 4362. Under these circumstances, the House Report should be accorded greater weight than might be appropriate if there were a more authoritative source from which to glean the intent of the legislature as a whole. *See* D. Sands, 2A Sutherland Statutory Construction § 48 (1973).

affecting". The threshold test applies "whenever a Federal Activity ha[s] a functional interrelationship from an economic, geographic or social standpoint with a State coastal program's land or water use policies". *Id.* at 34. As an alternative phrasing of the threshold test, the House Committee stated that the Federal consistency requirements should apply "when a Federal agency initiates a series of events of coastal management consequence". *Id.* Congress indicated its support of an "expansive interpretation of the threshold test". *Id.* at 35. In order to effectuate the purposes of the Act, consultation between federal and state agencies should occur "at the earliest practicable time". *Id.* at 34; *see also* S. Rep. No. 783, *supra*.

Defendants contend that the 1980 legislative history is not entitled to great weight. They argue that, in interpreting the intent of the body which enacted the statute, no deference is due to statements of a "post-enactment Congress". In support of this review, defendants cite a frequently quoted dictum: "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one". *United States v. Price*, 361 U.S. 304, 313 (1960).

The present situation is readily distinguishable from that in *United States v. Price*. There the inferences of legislative intent did not flow from explicit Congressional statements, but from Congressional inaction on amendatory legislation. The sole passing reference by Congress to the disputed provision was characterized by the court in *United States v. Price* as "a slender reed". *Id.* at 304. In contrast, the recent legislative history of the CZMA contains statements of great significance from both houses of Congress.

While subsequent legislative history generally is not controlling, neither should subsequent congressional interpretation be "rejected out of hand". *Andrus v. Shell Oil Co.*, 446 U.S. 657, 667 n. 8 (1980). While acknowledging that the admonition propounded in *United States v. Price* remains sound, the Supreme Court explained in *Andrus* that a court should nevertheless give appropriate weight to arguments predicated upon congressional actions. *Id.* The

court should not overlook valuable sources in the search for legislative intent. *See Walt Disney Productions v. United States*, 480 F.2d 66, 68 (9th Cir. 1973), *cert. denied*, 415 U.S. 934 (1974).

Here, the 1980 legislative history has special relevance. In reauthorizing the 1972 Act, Congress made explicit references to the provision in dispute, as well as to the very phrase within the disputed provision. This Court is bound to give careful consideration to the explicit statements made by the 1980 Congress during its reauthorization of the CZMA.

Only a definition which provides for the application of § 307(c)(1) at the decision-making stage of the leasing process will effectuate the congressional intent and give proper meaning and focus to the Act. Clearly, the consistency requirement should apply when a federal agency initiates a series of events which have consequences in the coastal zone. Any other interpretation would thwart the purposes of the Act.

D. Interpetation by Reference to Related Statutes

The defendants argue that the Secretary's obligations under § 307(c)(1) must be interpreted in light of his obligations under OCSLA, as well as under NEPA and ESA. An expansive interpretation of the Secretary's duties under § 307, according to defendants, would create a conflict with the functions and purposes of the other applicable statutes affecting the OCS.

As to the relationship between OCSLA and the CZMA, defendants contend that to impose the requirement of consistency review on pre-leasing activities would nullify § 19 of OCSLA which provides for the Secretary's consideration of recommendations submitted by a state governor. 43 U.S.C. § 1345. Defendants explain that the scheme of regulation of the OCS as set forth in the 1978 Amendments of OCSLA, Pub. L. No. 95-372; 92 Stat. 629 (1978), accords the Secretary the authority to direct development of the OCS. In defendants' view, the construction of the CZMA urged by plaintiffs would result in a substitution of the state's judgment of the Secretary's, contrary to the intent

of Congress as expressed in the amendments to OCSLA. Therefore, defendants urge the Court to give "overriding weight" to § 19 of OSCLA in construing § 307 of the CZMA.

At the outset, it should be noted that the CZMA has certain unique objectives which set it apart from the other statutes relied upon by defendants. NEPA, OCSLA, ESA, and the CZMA share the common goal of preserving and protecting the nation's resources.[11] Only the CZMA was intended to encourage active participation of state and local governments in developing and implementing the plans for meeting the common goal.[12] In the remaining statutes, Congress imposes certain responsibilities on the federal government and federal agencies without mandating participation by the states into the statutory scheme.

Although both the CZMA and OCSLA focus on offshore oil and gas leases, there is a marked difference in the central focus of each statute. *Massachusetts v. Andrus*, 594 F.2d 872 (1st Cir. 1979). Under OCSLA, the emphasis is upon development of oil, gas and other minerals. In contrast, the CZMA is a statute directed to, and solicitous of,

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[11] The CZMA was enacted by Congress "to preserve, protect, develop, and, where possible, to restore or enhance, the resources of the Nation's coastal zone." 16 U.S.C. § 1452(a).

OCSLA directs the Secretary of the Interior to prescribe rules and regulations deemed "necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the Outer Continental Shelf, and the protection of correlative rights therein." 43 U.S.C. § 1334(a)(1).

NEPA recognizes that "each person has a responsibility to contribute to the preservation and enhancement of the environment". 42 U.S.C. § 4331(c). *See also* 42 U.S.C. § 4331(b).

Principal purposes of the ESA are to "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species". 16 U.S.C. § 1531(b).

[12] *See* 16 U.S.C. § 1452. As one commentator observed, the CZMA "reflects a strong congressional intent to give states and their delegates a more significant management role than the national government". Finnell, Federal Regulatory Role in Coastal Land Management, 1973 American Bar Foundation Research Journal 173, 249-250.

environmental concerns. *American Petroleum Institute v. Knecht*, 456 F. Supp. 889, 919 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979). Due to this significant difference in objectives between CZMA and the other statutes, it is doubtful that it would be proper to interpret the CZMA in light of the other statutes.

Obviously, the court must construe federal statutes so that they are consistent with each other, as by this means congressional intent can be given its fullest expression. *Get* 95th Cong., 2d Sess. 153, n.52, *reprinted in* [1978] U.S. Code & Cong. Ad. News 1559.

An analysis of the rights and duties imposed by the two statutes reveals the mode of "co-existence" of the CZMA and OCSLA. Although both provisions focus on the leasing process, neither the obligations imposed nor the parties involved in the two provisions are identical. Section 19 of OCSLA requires that the Secretary consider recommendations submitted by the governor of the state where the lease sale is to be held. 43 U.S.C. § 1345. Once the Secretary has made certain determinations with regard to the recommendation, his decision to accept or reject the recommendations is final. In contrast, § 307(c) of the CZMA does not require that the Secretary evaluate such recommendations. The frame of reference for the Secretary's determination under the CZMA is the state's coastal management plan. The CZMA does not deprive the Secretary of the opportunity to regulate size, timing or location of proposed lease sales. No absolute veto power has been bestowed upon plaintiffs by § 307(c)(1). Instead, the CZMA provides a more complete opportunity for federal-state consultation and cooperation. In the event serious disagreements arise between the state and the federal government as to the propriety of the federal agency's determination, either part may seek mediation. 16 U.S.C. § 1456)h); 15 C.F.R. § 930.113-116.

In claiming that § 19 of OCSLA denies the states the right to participate in consultation or coordination of pre-leasing activities, defendants rely on *California v. Kleppe*, 604 F.2d 1187 (9th Cir. 1979). In *California v. Kleppe*, the Ninth Circuit focused on the question whether Congress in-

tended the Secretary of the Interior or the Environmental Protection Agency to promulgate air quality regulations for the Outer Continental Shelf. The Secretary claimed authority to promulgate the regulations pursuant to OCSLA, while the EPA claimed authority to do so under the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* Looking to the legislative history and the language of the 1978 amendments to OCSLA, the court found no indication that Congress had contemplated "dual jurisdiction" of the Secretry and the EPA over OCS activities which affect air quality. *California v. Kleppe, supra* at 1194. According to the court's analysis, there is no suggestion that the Secretary is to share authority to promulgate air quality regultions for the OCS. *Id.* at 1193.

The present case is readily distinguishable from *California v. Kleppe.* In contrast, here Congress did contemplate concurrent authority of the state and the federal agencies over the coordination of OCS activities. Although the savings clause, § 608 of OCSLA, 43 U.S.C. § 1866, does not explicitly portect whatever authority EPA might have had pursuant to its jurisdictional grant under the Clean Air Act, 42 U.S.C. § 7607(b)(1), it does explicitly provide that the requirements under the CZMA are neither modified nor repealed by the 1978 Amendments to OCSLA. The duties imposed on the Secretary under OCSLA are compatible with the duties imposed under the CZMA. Enforcement of the requirements of § 307 of the CZMA will not frustrate the Secretary's authority under OCSLA to make the resources of the OCS "available for expeditious and orderly development, subject to environmental safeguards". *See* 43 U.S.C. § 1332(3). Participation in the consultation process envisioned by the CZMA will, in fact, further the purposes of the CZMA.

Even though the obligations imposed on the Secretary under the CZMA do not impair his authority under OCSLA, it is conceded that the Secretary may be confronted by the complex task of resolving competing interests and balancing the numerous priorities set by Congress. Also, some delays are inherent in a planning process involving participants at all levels of government. But, it is not

the proper function of the judiciary to question the means Congress has chosen to manage the resources of the coastal zone. This is a matter committed to legislative judgment. *Cf. Hodel v. Virginia Mining and Reclamation Assoc.*, 49 U.S.L.W. 4654 (June 15, 1981).

E. NOAA's Interpretation

The administrative agency's inerpretation of a statutory provision also aids the Court in its determination of the legislative intent of the CZMA. It is a settled principle that an agency's interpretation of a statute is normally entitled to deference from the courts. *Train v. NRDC*, 421 U.S. 60, 87 (1975); *Udall v. Tallman*, 380 U.S. 1 (1965); *see also American Petroleum Institute v. Knecht*, 456 F. Supp. 889 (C.D. Cal. 1978). Here, the National Oceanic and Atmospheric Administration ("NOAA") is the agency within the Department of Commerce charged with the responsibility of promulgating regulations for the CZMA. *See American Petroleum Institute v. Knecht, supra*, at 908. During enactment of the 1976 amendments, Congress specifically directed NOAA to clarify certain requirements of the Act and thus affirmed the responsibility NOAA had assumed in administering the 1972 Act. The fact of NOAA's technical expertise in matters relating to the nation's coasts also suggests that deference should be accorded to its continuing construction of this Act. *See Ethyl Corp. v. Environmental Protection Agency*, 176 U.S. App. D.C. 373, 541 F.2d 1 (1976).

Until May 1981, NOAA consistently took the position that Interior's pre-leasing activities were subject to consistency review. For instance, in 1977, NOAA responded to a request to clarify the statutory language in the consistency provisions of § 307. NOAA then stated that it was "considering a position which treats the Department of the Interior's prelease sale decisions, such as tract selections and choice of lease stipulations, as a 'Federal activity' subject to the requirements of § 307(c)(1) of the Act". 42 Fed. Reg. 43586, 43591 (1977) (comment accompanying second set of proposed regulations). In light of the dispute between Interior and Commerce as to the applicability of the § 307(c)(1)

consistency requirements to the OCS leasing process, NOAA refrained from taking a firm position at that time. *See* 42 Fed. Reg. 43592; 43 Fed. Reg. 10510, 10512 (1978).

NOAA's final regulations in 1978 were based upon a liberal construction of all threshold tests triggering consistency review under § 307. NOAA concluded that § 307(c)(1) (as well as the following subsections) was intended to apply to "all Federal actions which were *capable* of significantly affecting the coastal zone".[13] 43 Fed. Reg. 10510, 10511 (1978) (emphasis added). Favoring broad inclusion of federal activities in the process of consistency review, NOAA concluded that a federal action would meet the threshold test under § 307 even when cumulative effects are determined to be beneficial.[14] 43 Fed. Reg. 10510, 10519 (1978) (to be codified at 15 C.F.R. §§ 930.10-.145).

The NOAA regulations, as amended in June 1979, reflect the view that pre-leasing activities fall within the purview of § 307(c)(1). 44 Fed. Reg. 37142-43, 37146-47 (1979) (comment to 15 C.F.R. § 930.33 (1979)). In support of its view, NOAA explained that "[i]mplementation of this requirement at the OCS pre-lease sale stage should lead to minimization of adverse coastal environmental and socioeconomic impacts". 44 Fed. Reg. 37142. According to NOAA's comment, "Federal agencies are encouraged to construe liberally the 'directly affecting' test in borderline cases to favor inclusion of Federal activities subject to consistency review". *Id.* at 37146-47.

As recently as April 1980, NOAA reiterated this view. In a letter dated April 9, 1980, addressed to State Coastal Management Program Directors, the Assistant Administra-

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[13] As discussed *infra* at p. 37, the Court, in accord with the opinion letter issued by the Department of Justice, rejects the specific definition promulgated by NOAA in the 1978 regulations, in which a "significantly affecting" test is substituted for the "directly affecting" threshold test of § 307(c)(1). The rejection of NOAA's definition is not intended to imply a rejection of the general position of the agency to whom the Department of Commerce has delegated its functions pursuant to the CZMA. Deference to NOAA's support of a liberal construction of the threshold test does not require the adoption of NOAA's exact language in defining a statutory phrase.

[14] *See* Schoenbaum & Parker, *supra* note 4, at 231.

tor of NOAA stated its view that "Federal consistency requirements subject final notices of OCS sales to consistency determinations". Ex. L-16.

In sum, NOAA's regulations and the comments thereto consistently supported the application of § 307(c)(1) to final notices of OCS sales. The view of the agency charged with implementing the CZMA, established over a long period of time, is certainly entitled to deference.

Recently, however, NOAA's position has changed abruptly. On May 14, 1981, approximately two weeks after the complaints were filed in the present cases, NOAA published a notice of proposed rulemaking in which it defined "directly affecting". 46 Fed. Reg. 26658, 26659 (1981). The definitions adopted by NOAA represent a complete departure from previous interpretations of the threshold phrase. According to NOAA's newly proposed definition, a federal activity directly affects the coastal zone only "if the Federal agency finds that the conduct of the activity itself produces a measurable physical alteration in the coastal zone or that the activity initiates a chain of events reasonably certain to result in such alteration, without further required agency approval". *Id.* In the comments to this notice, NOAA listed lease issuance as an example of an activity which would not be subject to a consistency determination because it does not directly affect the coastal zone. *Id.* at 26660. On July 2, 1981, NOAA issued its notice of final rulemaking which reiterated the view of the consistency requirements under the CZMA, as first announced less than two months earlier.

The new notice of rulemaking is not entitled to special deference here. The Secretary's negative determination was made more than a year before these regulations were issued. Federal defendants admit that these regulations have "no direct bearing on the validity of the Secretary's interpretation". Federal Defendants' Summary Judgment Memorandum at 32, n.4. There is the ever-present danger that regulations proposed subsequent to the initiation of the litigation are self-serving; thus, they are generally suspect. As newly proposed regulations at variance with the previous regulations, they do not reflect a well-established agency interpretation. Therefore, a principal rationale sup-

porting deference to the agency is absent. *See Ethyl Corp. v. EPA, supra; cf. FTC v. Dean Foods Co.*, 384 U.S. 597 (1966). Also, the Court finds that this newest interpretation is inconsistent with the CZMA's policy of furthering long-range planning for coastal resources. The Court is "not obliged to stand aside and rubber-stamp an administrative position deemed inconsistent with a statutory mandate". *NLRB v. Brown*, 380 U.S. 278, 291 (1965). Here the position is inconsistent not only with statutory policy, but with the agency's own interpretation during the past four years. Therefore, the Court concludes that although NOAA's long-standing interpretation of the consistency requirements is entitled to deference, NOAA's new interpretation, first proposed in May 1981, is not.

F. Applicability of Dictionary Definitions

Defendants contend that the phrase directly affects should be construed by reference to the definition of "directly" found in Webster's dictionary. Webster's New International Dictionary (unabridged 3d ed. 1971) provides six alternative definitions for the word "directly":

1. a. without any intervening space or time; next in order; squarely, exactly,
   b. in a straight line; without deviation of course, by the shortest way.
2. a. straight on; along a definite course of action without deflection or slackening;
   b. purposefully or decidedly and straight to the mark; in a straightforward manner without hesitation, circumlocution, or equivocation; plainly and not by implication; in unmistakable terms; unqualifiedly;
   c. without divergence from the source or the original;
   d. simultaneously and exactly or equally.
3. in close relational proximity.
4. a. without intervening agency or instrumentality of determining influence; without any intermediate step;
   b. in the exact words of the original; verbatim.
5. a. in independent action without any sharing of authority or responsibility;

b. face-to-face, in person.

6. a. without a moment's delay; at once, immediately;

b. after a little, in a little while, shortly, presently.

According to defendants, the "plain meaning", based upon the dictionary definition, is "effects resulting from an activity without an intervening cause". Federal Defendants' Reply Memorandum in Support of Their Motion for Summary Judgment at 14. Defendants' invocation of the plain meaning rule to support their choice among rival definitions of an inherently vague phrase should not be allowed to cloud the issue. As one commentator has warned, reliance on the plain meaning rule is too often merely "verbal table thumping to reinforce confidence in an interpretation arrived at on other grounds". Sands, 2A Sutherland Statutory Construction, § 46.01 at 49 (3d ed. 1973).[15] Use of the plain meaning label is simply a subterfuge in the present case. Although Webster offers six alternative definitions, defendants ignore four of the six meanings without explanation. Moreover, their choice of phrasing—"effects resulting from an intervening cause"—is not identical to any definition presented by Webster; it merely incorporates a portion of two of the six alternatives.

The defendants' construction of the phrase would produce an unreasonable result. The doctrines of intervening cause of proximate cause are familiar guiding principles in the law of torts, but there is no basis for importing those concepts into the present context. The doctrine of intervening cause was created by the courts to limit the extent of the defendant's liability for damages in tort. W. Prosser, Law of Torts § 44 (4th ed. 1971). It has no relevance in construing the CZMA which has the purpose of providing long-term planning for the presentation and management of coastal resources. Where the "plain meaning" would produce a result at odds with the policy of the statute in question, the Court should look to the purpose of the legislation rather than to a definition borrowed from another context.

[15] *See also* Merz, The Meaninglessness of the Plain Meaning Rule, 4 Dayton L. Rev. 31 (1979).

Trustees of Indiana University v. United States, 618 F.2d 736 (Ct. Cl. 1980). The dictionary definitions advanced by the defendants are clearly contrary to the congressional intent and, if applied, would thwart the objectives of the CZMA. In fact, as they must admit, if the definitions urged by the Secretary and the intervenor defendants were adopted, the issuance of the final notice of lease sale would require a consistency determination only in the rarest case. Such a result would not be in furtherance of the stated policies and goals of the CZMA.

Finally, although not necessary to this decision, it should be noted that if defendants' definition were applied in construing the threshold test under § 307(c)(1), the Court need not reach a contrary result. There are cases supporting the view that a lessor may be held liable for activities carried on by the lessee where land was leased for the purpose of carrying on the very activity which caused the harm. *See, e.g., Green v. Asher Coal Mining Co.*, 377 S.W. 2d 68 (Ky. 1964); *United States v. Morrell*, 331 F.2d 498 (10th Cir. 1964); *Daigle v. Continental Oil Co.*, 277 F. Supp. 875 (W.D. La. 1967); *Benton v. Kernan*, 130 N.J. Eq. 193, 21 A.2d 755 (1941). In *Green v. Asher Coal Mining Co., supra*, the court held that the owner of land leased for strip mining purposes could be held liable for injury arising out of the acts of the lessee. The court reasoned that an owner cannot escape liability by showing that he did not personally create the condition or commit the wrongful act, if the expected operations under the lease result in an injury that might have been reasonably anticipated. *Id.* at 72. Similarly, in *Daigle v. Continental Oil co., supra*, a lessor of land on which the carbon black plant of lessee was located was held liable to adjacent property owners for damage caused by emission of carbon black and coke dust from the plant.

In these cases, the parties did not frame their arguments in terms of intervening cause. The results, however, comport with a finding of no intervening cause.[16] The cases

[16] As defined in Black's Law Dictionary (5th ed. 1979):

> The "intervening cause," which will relieve of liability for an injury, is an independent cause which intervenes between the original wrongful act or omission and the injury, turns aside the nat-

stand for the proposition that the lessor is not automatically relieved of liability for activities conducted by his lessee; that is, the lessee's involvement in the tortious conduct does not necessarily constitute intervening cause. Therefore, preleasing activities could have direct effects even if "direct" is defined on the basis of tort concepts. Defendants cannot deny that leasing activities have consequences in the coastal zone by pointing to a series of events which occur after the leases are issued, but before the actual effects are realized. The lessor of vast tracts in the OCS where sizable oil reserves have been estimated to exist "reasonably anticipates" effects in the coastal zone as a result of oil exploration, development, and production to be conducted by the lessees. The reasonable anticipation of these effects is obvious.

G. The Opinion Letter of the Department of Justice

In construing the ambiguous language within § 307(c)(1), the court must also give serious consideration to the opinion letter written by the Department of Justice on April 20, 1979. Ex. L-A. *Cf. Train v. NRDC*, 421 U.S. 60 (1974). The Department of Interior, charged with administering leasing activities in the OCS, and the Department of Commerce, responsible for the approval of state coastal management programs under the CZMA, disagreed as to the applicability of the consistency requirements of § 307(c)(1) to the OCS pre-leasing activities of the Secretary of Interior. In its opinion letter, the Department of Justice expressly repudiated Interior's contention that its pre-lease activities were *per se* exempt from the consistency requirement of § 307(c)(1). After analyzing the legislative history, the interrelationship of two of the consistency provisions, and

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ural sequence of events, and produces a result which would not otherwise have followed and *which could not have been reasonably anticipated.* (Emphasis added).

Thus, when the court in *Green v. Asher Coal Mining Co.*, 377 S.W. 2d 68 (Ky. 1964), employed the phrase "reasonably anticipated" in describing the causal connection between the leasing and the injury for which the lessor could be held liable, the court in effect concluded that none of the events subsequent to the leasing constituted intervening cause. *Id.* at 72.

the significance of subsequent legislation concerning the OCS, the Department of Justice concluded that "pre-leasing activities of the Secretary of Interior are subject to the conformity requirement of § 307(c)(1)". Ex. L-A at 13. Thus, the opinion lends further support to the Court's interpretation of the scope of the requirement in light of the legislative history and purpose of the statute.

The opinion letter does not attempt to resolve the problem of the proper definition of the phrase "directly affects". However, it does reject the substitution of the term "significantly" for the statutory term "directly". In the view of the Department of Justice, the legislative history does not justify this substitution. The Court concurs in this view.

The opinion did not reach the question whether the particular lease sale out of which the dispute arose[17] did directly affect the coastal zone. According to the Department of Justice, the question whether particular pre-leasing activities affect the coastal zone is one of fact and thus the Department was not authorized to answer the question. Ex. L-A.

H. The Direct Effects of Lease Sale No. 53

Although the Court is convinced that a final notice of lease sale would invariably directly affect the coastal zone in all but the most unusual case—a case which probably could only be posed as a hypothetical—it declines to hold that the final notice of lease sale is a generic category of federal activity which directly affects the coastal zone within the meaning of 307(c)(1). The Court agrees with the Justice Department that the determination as to whether the final notice of lease sale directly affects the coastal zone must be made on a case-by-case basis.

On these facts, the Court has no difficulty in finding such a direct effect. There is ample evidence within the administrative record that the Notice of Lease Sale No. 53 directly

[17] The dispute arose out of Lease Sale No. 48 involving 148 OCS tracts off southern California. The lease sale was held on June 29, 1979. Ex. L-27 (Summary of Mediation Conference between California and the Department of Interior, Oct. 19, 1979); Ex. L-7 (Mediator's Memorandum for the Secretary of Commerce, Jan. 25, 1980); *see also* Linsley, *supra* note 2 at 454-461.

affects the coastal zone and, thus, satisfies the threshold test under § 307 of the CZMA.

For example, a reading of the notice itself reveals some of the many consequences of leasing upon the coastal zone. The "Notice of Oil and Gas Lease Sale No. 53 (Partial Offering) as published in the Federal Register,[18] announced ten stipulations to be applied to federal lessees. The activities permitted and/or required by the stipulations result in direct effects upon the coastal zone. Stipulation No. 4 sets forth the conditions for operation of boats and aircraft by lessees. Stipulation No. 6 states the conditions under which pipelines will be required; the Department of Interior, as lessor, specifically reserves the right to regulate the placement of "any pipeline used for transporting production to shore". Lessees must agree, pursuant to Stipulation No. 1, to preserve and protect biological resources discovered during the conduct of operations on the leased area.

The Secretarial Issue Document ("SID"), prepared in October 1980 by the Department of Interior to aid the Secretary in his decision, contains voluminous information indicative of the direct effects of this project on the coastal zone. For instance, the SID contains a table showing the overall probability of a oilspill impacting a point within the sea otter range during the life of the project in the northern portion of the Santa Maria Basin to be 52%.[19] Both the SID and the EIS contain statistics showing the likelihood of oilspills during the life of the leases; based on the unrevised USGS estimates, 1.65 spills are expected during the project conducted in the Santa Maria subarea. *See* SID at 190; *see also* EIS at 4-1 to 4-16. According to the SID, the probability of an oilspill is even higher when the revised USGS figures are utilized.

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[18] 46 Fed. Reg. 23674 (1981), Ex. L-4.

[19] *See* Table 3 in FWS letter of September 18, 1980, appended to SID, Ex. L-C at 205. This figure repreents the overall probability that one or more oilspills of 1,000 barrels or more will occur during the lifetime of the project and impact designated targets within 30 days. The FWS considers the data concerning the impact upon the sea otter range within 30 days to be the "primary data that should be considered when assessing possible effects on sea otters". Ex. L-C at 189.

In addition, both the SID and the EIS list a multitude of impacts arising out of the operations in the leasing area of Lease Sale No. 3. The EIS, prepared by the BLM at the request of the Department of the Interior, includes a section entitled "Unavoidable Adverse Impacts"; the SID discusses the same factors under the caption"Multi-Use Conflicts". Disregarding the titles, the information contained in these sections is indicative of the consequences flowing from the Notice of Lease Sale 53 to the coastal zone. Both documents refer to impacts upon air and water quality, marine and coastal ecosystems, commercial fisheries, recreation and sportfishing, navigation, cultural resources, and socio-economic factors. EIS at 4-183 to 4-186; SID 80-132. For instance, the EIS states that "[n]ormal offshore operations would have unavoidable effects ... on the quality of the surrounding water". Pipelaying, drilling, and construction, chronic spills from platforms, and the discharge of treated sewage contribute to the degradation of water quality in the area. EIS at 4-183. As to commercial fisheries, drilling muds and cuttings "could significantly affect fish and invertebrate populations"; the spot prawn fishery in the Santa Maria Basin is particularly vulnerable to this physical disruption. EIS at 4-184. In reference to recreation and sportfishing, the EIS indicates the possibility of adverse impacts as a result of the competition for land between recreation and OCS/related onshore facilities as a result of the temporary disruption of recreation areas caused by pipeline burial. EIS at 4-184 to 4-185. There are the additional risks of "the degradation of the aesthetic environment conducive to recreation and the damage to recreational sites as a result of an oil spill". EIS at 4-185. Another impact on the coastal zone will occur as a result of the migration of labor into the area during the early years of the oil and gas operations. EIS at 4-185. Impacts on the level of employment and the size of the population in the coastal region are also predicted. EIS at 4-54.

The SID notes that there are artifacts of historic interest as well as aboriginal archaeological sites reported in the area of the Santa Maria tracts. SID at 119. The FWS and NMFS biological opinions, appended to the SID, indicate the likeli-

hood that development and production activities may jeopardize the existence of the southern sea otter and the gray whale. SID at 146.

These effects constitute only a partial list. Further enumeration is unnecessary. The threshold test under § 307(c)(1) would in fact be satisfied by a finding of a single direct effect upon the coastal zone. Although the evidence of direct effects is substantial, such a showing is not required by the CZMA. It is manifest that a consistency review is required in this case.

III. NEPA

Plaintiffs also seek to enjoin the leasing of tracts in the northern portion of the Santa Maria Basin on the basis of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4331 *et. seq.* They allege that defendants have failed to comply with § 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), which requires federal agencies to prepare and to circulate an environmental impact statement ("EIS") for major federal actions significantly affecting the quality of the human environment. Plaintiffs challenge the adequacy of the EIS prepared for Lease Sale No. 53 because the EIS failed to incorporate the most recent estimates of oil and gas reserves in the basin. Due to the alleged failure of the EIS to consider the newest data concerning the estimated hydrocarbon reserves, plaintiffs contend that a supplemental EIS is required by NEPA.

In September 1980, the final EIS on Lease Sale No. 53 was released by the Bureau of Land Management ("BLM"). The evaluation of environmental effects of Lease Sale No. 53 was based upon existing estimates of recoverable oil and gas resources, provided by the United States Geological Survey ("USGS"), Conservation Division, Los Angeles, California., At page xii of the EIS is an Addendum which presents the revised estimates of oil and gas resources for the five basins involved in Lease Sale No. 53, as of August 28, 1980. The expected recoverable resources were found to be "roughly twice the amount assumed in the draft and final EIS analyses". EIS at xii. The evaluations in the body of the EIS are based upon the original USGS estimates of

reserves, rather than on the more recent statistics. A Secretary Issue Document ("SID"), prepared in October 1980 for then Secretary Andrus did, however, incorporate the revised USGS estimates.

The central issue to be resolved is whether the EIS filed by the BLM concerning proposed Lease Sale No. 53 was adequate according to procedures set forth in the National Environmental Protection Act. In evaluating the procedural adequacy of the EIS, the Court is guided by the standard adopted by this circuit:

> [A]n EIS is in compliance with NEPA when its form, content, and preparation substantially (1) provide decision-makers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in the light of its environmental consequences, and (2) make available to the public, information of the proposed project's environmental impact and encourage public participation in the development of that information. [Citation omitted]

Columbia Basin Land Protection Association v. Schlesinger, 643 F.2d 585, 592 (9th Cir. 1981). The adequacy of the content of the EIS is determined by a rule of reason, which requires only "[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences". *Id.*, quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974). As the Ninth Circuit has cautioned, there is no *per se* rule requiring the inclusion of every potentially significant statistic. *See Westside Property Owners v. Schlesinger*, 597 F.2d 1214, 1217 (9th Cir. 1979). Rather, "the test of EIS adequacy is pragmatic and the document will be examined to see if there has been a good faith attempt to identify and to discuss all foreseeable environmental consequences". *Columbia Basin Land Protection Association v. Schlesinger, supra* at 592, quoting *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 552 (9th Cir. 1977) (*per curiam*).

The sole procedural defect of which plaintiffs complain is the failure of defendants to incorporate the USGS revised estimates in the discussion of environmental effects in the EIS. At the outset, it must be noted that defendants did

not completely ignore the new estimates. The revised USGS estimates were clearly presented in an addendum at p. xii which preceded the main body of the EIS. Thus, it cannot be said that this information was not made available to the public.

Also, the EIS did point out the "high degree of uncertainty regarding the level of oil and gas reserves which might be present". EIS 1-12. The unrevised USGS estimate which predicts an initial yield of 400 million barrels for the Santa Maria Basin, is described as a "conditional probability". EIS 1-9, 1-11. Thus, the EIS does not disguise the fact that estimates of oil reserves, which form the basis of the predictions of a variety of environmental impacts, are "inherently speculative". EIS 1-13. Thus, this preliminary explanation of the reliability of estimates of hydrocarbon reserves serves as evidence of a "good faith attempt" to discuss foreseeable environmental consequences.

Perhaps, as plaintiffs suggest, detailed analysis of this new data, incorporated in the body of the EIS, would be more effective in informing the public of the potential risk posed to the environment. However, the format selected for the presentation of the information is left to the discretion of the federal agency. The Court's role is to ensure that the agency has taken a "hard look" at the environmental consequences, *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), and not to prescribe in detail the method by which the agency conveys this information to the public.

Assuming for the purpose of argument that the EIS was inadequate, according to the procedures set forth in NEPA, defendants argue that the SID has cured this alleged inadequacy. The SID, prepared a month after the EIS, presented the revised USGS figures and analyzed certain environmental impacts on the basis of the current estimates. SID at 1, 59. While the SID comments that the revised USGS estimates, which "indicate significantly higher resources for oil and gas", result in "higher environmental cost estimates", *Id.* at 1, it is not clear that the SID's limited analysis of the revised figures sufficiently clarifies the issues raised by the prediction doubling the estimated hydrocarbon reserves. Nevertheless, the Court need not

reach the question whether the SID alone would cure the alleged defect. Although the SID may not be sufficient in itself to remedy the omission of significant data, the document is likely to be helpful as a complement to the EIS by interpreting or clarifying issues raised in the EIS. *North Slope Borough v. Andrus*, Slip. Op. No. 80-1148, 15 E.R.C. 1633 (D.C. Cir. Oct. 9, 1980).

Under the facts of this case, the Department of Interior's actions in filing the EIS with an addendum presenting the newly revised estimates of hydrocarbon reserves, in addition to preparing an SID which analyzes certain impacts in light of the new data, comport with NEPA. Due to the high degree of uncertainty regarding the estimates of hydrocarbon reserves in the Santa Maria Basin, the decision of the Department of Interior not to file a supplement or to revise the existing EIS in the few days remaining before publication is not unreasonable. The Court concludes that "although the EIS could be 'improved by hindsight, it has satisfied the intent" of NEPA. *Cady v. Morton*, 527 F.2d 786, 797 (9th Cir. 1975), quoting *National Forest Preservation Group v. Butz*, 485 F.2d 408, 412 (9th Cir. 1973).

IV. SECTION 19 OF THE OUTER CONTINENTAL SHELF LANDS ACT

A third claim for injunctive and declaratory relief is premised on the Secretary's alleged violation of § 19 of the Outer Continental Shelf Lands Act ("OCSLA"). 43 U.S.C. § 1345. Section 19 provides that the governor of an affected state may submit recommendations to the Secretary regarding the size, time or location of the proposed lease sale, 43 U.S.C. § 1345(a), and that the Secretary is required to accept the governor's recommendations "if he determines ... that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State". 43 U.S.C. § 1345(c). Plaintiffs contend that the Secretary's decision to reject Governor Brown's recommendation to delete the tracts in dispute from Lease Sale No. 53 fails to comply with § 19. According to plaintiffs, since the Governor's recommendation provided for a "rea-

sonable balance" as required by § 19, the Secretary was obligated to accept the recommendation.

In deciding whether the Secretary's decision to proceed with Lease Sale No. 53 complies with § 19 of OCSLA, the scope of the court's inquiry is limited by the deferential standard of review applicable to this determination. *See, e.g., Ethyl Corp. v. EPA*, 176 U.S. App. D.C. 373, 541 F.2d 1 (D.C. Cir. 1976). The statute itself provides that the Secretary's acceptance or rejection of such recommendations shall be final, "unless found to be arbitrary or capricious". 43 U.S.C. § 1345(d). In determining whether the Secretary's rejection of the Governor's recommendations was arbitrary or capricious, the Court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), quoted in *Bowman Transportation Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); *Washington State Farm Bureau v. Marshall*, 625 F.2d 296 (9th Cir. 1980). The Court may not substitute its judgment for that of the agency.

In the present case, the record shows that the Secretary did undertake an examination of the balance between the interests at stake in Lease Sale No. 53. In a letter subsequently mailed to the Governor, the Secretary described the mode of analysis employed in the Secretary's balancing process. Defendants' Ex. L-P (letter from Secretary Watt of Governor Brown, dated May 1, 1981). This explanation indicates that the Secretary evaluated such "quantifiable factors" as income from resource development and expected monetary losses due to oil spills. Factors which, in the Secretary's view, were "not quantifiable", including damage to wildlife, decline in water quality, and "aesthetic and lifestyle losses", were given only cursory consideration. A thorough evaluation of all relevant factors through more sophisticated analytical techniques would certainly have been desirable, but within wide limits, the final decision as to the type of analysis which is appropriate in view of the available data must be the agency's, subject to review only for obvious errors of methodology. *Massa-*

chusetts v. Andrus, 594 F.2d 872, 886 (1st Cir. 1979). Under the applicable standard of review, the Court cannot conclude that there has been a clear error of judgment.

The Secretary's mode of analysis must also be considered in light of the fact that OCSLA provides little or no guidance as to the proper basis for the Secretary's evaluation of a governor's recommendation. In deciding whether to accept or reject the Governor's recommendation, the Secretary must determine whether it provides for a "reasonable balance" of two key factors—the "national interest" and the "well-being of the citizens of the affected State." 43 U.S.C. § 1345(c). Section 19 requires that the determination of the "national interest" be based on "the desirability of obtaining oil and gas supplies in a balanced manner", but provides no basis for evaluating the citizens' well-being. *Id.*

Nevertheless, the fact that the statute fails to provide explicit guidance will not excuse the absence of reasoned analysis of all considerations specified within the Act. The Court has a responsibility to scrutinize an agency's judgment as to the proper balance to be struck between conflicting interests. *NLRB v. Brown*, 380 U.S. 278 (1965). Here, the Secretary's extremely limited consideration of one of two potentially conflicting interests, the "well-being of the citizens of the affected State", barely suffices to meet the plaintiffs' challenge.

Plaintiffs also point to purported procedural flaws in the Secretary's determination pursuant to § 19. First, plaintiffs complain of a lack of opportunity for consultation. The statute imposes the responsibility on the Secretary for the provision of such an opportunity. 43 U.S.C. § 1345(c). However, the timing of the opportunity and the mode of making consultation available is within the Secretary's discretion. The record indicates the existence of limited formal correspondence between the parties, including Governor Brown's letter of December 24, 1980, and Secretary Watt's letter of February 10, 1981. Although minimal communication in writing is not conducive to meaningful consultation between the Secretary and the Governor, it nevertheless meets the bare technical requirements of the statute. In sum, there is an insufficient basis for the conclusion that

the Secretary arbitrarily and capriciously deprived the Governor of further opportunities for consultation.

A second alleged procedural flaw relates to the requirement that the Secretary communicate to the Governor in writing his reasons for rejecting the recommendation. 43 U.S.C. § 1345(c). The Secretary's letter to Governor Brown, dated May 1, satisfies this requirement. The statute does not require that the written explanation be provided prior to the Secretary's announcement of his decision to proceed with the lease sale. Although the provision of a timely explanation is likely to be more effective in implementing the statutory policy if insuring governors of affected states a "leading role in OCS decisions",[20] H. Conf. Rep. 95-1474, 95th Cong., 2d Sess. 106, *reprinted in* [1978] U.S. Code Cong. & Ad. News 1674; H.R. Rep. 95-590, 95th Cong, 2d Sess. 152, *reprinted in* [1978] U.S. Code Cong. & Ad. News 1558, the Court cannot substitute its judgment for that of Congress by imposing a requirement concerning the timing of the explanation.

There is one further aspect of the timing of the explanation which requires comment. Because the Secretary's reasons for his decision were committed to writing 21 days after the announcement of the decision and 2 days after this suit was filed alleging a failure to provide an adequate rationale for the rejection of the Governor's recommendation, the Secretary's explanation is subject to the inherent danger of "*post hoc* rationalization". *See Overton Park v. Volpe, supra*, at 419-20; *American Petroleum Institute v. Knecht, supra*, at 908-9. An explanation which takes on the aspect of a litigation affidavit must, of course, be viewed critically. *Id.* However, the danger presented by *post hoc* explanations may be less where, as here, the announced agency decision was accompanied by a contemporaneous ex-

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[20] Section 19 is "intended to insure that Governors of affected States, and local government executives within such States, have a leading role in OCS decisions and particularly as to lease sales and development and production plans. In addition, it is intended to provide a mechanism for involvement of Governors and local government officials". H. Rep. 95-590, 95th Cong., 2d Sess. 152, *reprinted in* [1978] U.S. Code Cong. & Ad. News 1558.

planation of some of the considerations that formed a basis of the decision,[21] and where the administrative record lends some support to the explanation. *See Camp v. Pitts*, 411 U.S. 138 (1973) (*per curiam*). That is the best that can be said for the Secretary's timing.

Taking into consideration all of the foregoing factors, the Court must conclude that the Secretary has complied, although minimally, with the necessary procedural requirements under § 19 of OCSLA. 43 U.S.C. § 1345. Although the Secretary quite clearly violated the spirit of the Act, giving due deference to his judgment, it cannot be said that his determination to reject the recommendation submitted by Governor Brown was legally "arbitrary and capricious".

V. ENDANGERED SPECIES ACT

As a fourth ground of relief, plaintiffs allege that defendants have violated the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, which directs federal agencies "to conserve endangered and threatened species". 16 U.S.C. § 1531(c). Section 7(a) of the Act requires each federal agency to "insure" that an action by that agency "does not jeopardize the existence of any endangered species or threatened species . . . ." 16 U.S.C. § 1536(a)(2). In order to facilitate compliance with this requirement, the Act imposes on the Secretary and any agency whose actions may affect an endangered or threatened species the duty of

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[21] On April 10, 1981 at 10:00 a.m., the Department of Interior issued a news release, discussing generally the accelerated five-year offshore leasing plan proposed by the Department of Interior. Included in the New Release is a brief discussion of Lease Sale No. 53, in which some of the interests "balanced" by the Secretary are noted.

Defendants have questioned the propriety of considering information contained in documents which do not form a part of the administrative record. The Ninth Circuit has concluded that where the court finds it necessary to go outside the administrative record, it may consider such evidence "to ascertain whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision". *Asarco, Inc. v. EPA*, 616 F.2d 1153 (9th Cir. 1980). Under this analysis, it is proper to consider the press release in evaluating the danger of *post hoc* rationalization in the Secretary's course of action, described *supra*.

"consultation".[22] Section 7(c)(1), 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.04 (1980). Section 7(c)(1) provides:

> To facilitate compliance with the requirements of subsection (a)(2) of this section, each Federal agency shall ... request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action.

In fulfilling the consultation requirement of Section 7(c), the agency is required to "use the best scientific ... data available". *Id.*

During April of 1980, the BLM requested biological opinions from the two federal agencies with jurisdiction over the marine animals which it had determined were likely to be affected by the proposed lease sale. In response to this request, the National Marine and Fisheries Service ("NMFS") prepared a biological opinion on the impact of the lease sale on various species of whales and sea turtles, and the Fish and Wildlife Service ("FWS") prepared a biological opinion on the impact of the lease sale on the southern sea otter and other species of wildlife. Ex. L-5 (FWS Opinion), Ex. L-6 (NMFS Opinion). Both opinions concluded that the proposed lease sale and exploration activities associated with Lease Sale No. 53 were not likely to jeopardize any endangered or threatened species. *Id.*

Plaintiffs challenge the adequacy of the two biological opinions. First, plaintiffs claim that, in failing to reappraise the risks posed by leasing activities and exploratory drilling in light of the revised USGS resource estimates, defendants have not employed "the best scientific data available".

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[22] The implementing regulations under § 7 of ESA provide for formal consultation with one or both of two agencies which share responsibilities under the ESA; these agencies are the United States Fish & Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS"). 50 C.F.R. §§ 402.01, 402.04.

Secondly, according to plaintiffs, biological opinions which fail to evaluate the risks at the development and production stages cannot provide an adequate basis for a finding of no jeopardy.

The short answer to plaintiffs' expressed concern that defendants did not utilize the newest information as to the revised oil reserve estimates is simply that the agencies which prepared the biological opinions did evaluate the risks posed to endangered or threatened species in light of that data. The FWS opinion discussed the significance of the revised USGS resource estimates in its analysis of the cumulative effects upon sea otters as the result of an oil spill, and explicitly stated that its findings were based on "the new oilspill analysis data of August 28, 1980". Ex. L-5 at 9-11. The NMFS opinion was drafted before the NMFS became aware of the revised estimates of hydrocarbon potential. However, upon consideration of the revised estimates, the NMFS concluded that there was "no increased risk to marine mammals and endangered species" during the leasing and exploration stages and, therefore, no modification of the biological opinion prepared for Lease Sale No. 53 was required. Declaration of James H. Lecky.[23]

Any question as to the extent of the consideration given the revised resource estimates is beyond the proper scope of review. *See, e.g., Citizens to Preserve Overton Park v. Volpe, supra.*, at 146. Since there is evidence of consideration of the new USGS data, the Court must conclude that the consultation was based upon the "best scientific information available" as required by § 7 of ESA.

The potential risks that may be incurred during the development and production phases were not ignored during the consultation process. In fact, the FWS opinion acknowledges that potential development/production-related facilities could have an effect on endangered and threatened species. Ex. L-5 at 3. Since the specific location, nature, and size of facilities that might be necessary during these pha-

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[23] James H. Lesky, as Marine Mammal and Endangered Species Coordinator for the Southwest Region, NMFS, was responsible for the preparation of the biological opinion which NMFS submitted to BLM on September 17, 1980.

ses is not yet known, the potential jeopardy to the endangered species posed by the subsequent phases of OCS development was not determined. *Id.*; Ex. L-6 at 4. Both opinions indicated, however, the necessity of reinitiation of consultation pursuant to § 7 of ESA prior to approval of development/production plans. *Id.* In light of the restrictions imposed on the FWS and the NMFS by the limited quantity of available information, the decision to evaluate only the risks incurred during leasing and exploration and to reinitiate consultation prior to develop and production cannot be held unreasonable. *See North Slope v. Andrus, supra*, at 37-42, and *Conservation Law Foundation v. Andrus*, 14 [BNA] E.R.C. 1049, 1050-51 and nn. 2-3 (1st Cir. Dec. 17, 1979); *but see Hill v. TVA*, 549 F.2d 1064, 1070-72 (6th Cir. 1977), *aff'd* 437 U.S. 153 (1978).

Plaintiffs allege a violation of another section of the ESA, § 7(d), which provides that a federal agency "shall make no irreversible or irretrievable commitment of resources ... which has the effect of foreclosing the formulation or implementation of any resonable and prudent alternative measures" which would avoid jeopardizing the existence of any endangered or threatened species. 16 U.S.C. § 1536(d). Plaintiffs have not demonstrated that such an irreversible or irretrievable commitment of resources has occurred as a result of the activities thus far approved during § 7 consultation. Although not yet addressed by the Ninth Circuit, two other circuits have rejected similar arguments to the effect that an OCS sale constitutes an "irreversible or irretrievable commitment of resources" within the meaning of § 7(d). *North Slope v. Andrus, supra; Conservation Law Foundation v. Andrus, supra.*

VI. "TAKING" UNDER § 9 OF THE ENDANGERED SPECIES ACT AND UNDER THE MARINE MAMMAL PROTECTION ACT

Plaintiffs' final claim arises under § 9 of the ESA, 16 U.S.C. § 1538, and under the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 *et seq.* They argue that a "taking" under § 9 of ESA and under the MMPA will result from the leasing of tracts in the northern Santa Maria Ba-

sin. The defendants' activities relating to Lease Sale No. 53 are not encompassed by the prohibitions of either § 9 of ESA or the MMPA.

The language of the statutes provides no support for plaintiffs' arguments. The statutes forbid any person to "take" any marine mammal or endangered species of fish or wildlife from waters within the jurisdiction of the United States. 16 U.S.C. § 1372(a)(1); 16 U.S.C. § 1538(a)(1). Assuming *arguendo* that the proposed leasing activities do constitute a threat to the continued survival of species protected by these statutes, such a threat would still not constitute a "taking" under the statutes. ESA defines the term "take" as meaning "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct". 16 U.S.C. § 1532(19). Thus, in prohibiting "taking", the draftsmen of the statutes envisioned a more immediate injury. *Cf. Palila v. Hawaii Dept. of Land & Natural Resources* 471 F. Supp. 985 (D. Hawaii 1979). A review of the record reveals no clear showing of such harm, attempted harm, or harassment[24] as is required by the statutes. Plaintiffs have not demonstrated that defendants' activities relating to Lease Sale No. 53 are encompassed by § 9 of ESA or by the MMPA.

VII. THE PROPER SCOPE OF ANALYSIS UNDER ESA, THE MMPA AND THE CZMA

A question common to three of the statutes relied upon by plaintiffs—ESA, the MMPA and the CAMA—is whether the Court should focus on a discrete stage of a multistage OCS project designed to exploit and develop the mineral resources of the OCS or whether the court should examine the project as a continuum of planned events. That is, in analyzing plaintiffs' claims under the different environmental statutes, should the Court look at Lease Sale No. 53 merely as the first discrete link in the chain or

[24] The regulations of the Fish and Wildlife Service further define "harass" as "an intentional or negligent act or omission ... annoying wildlife to such an extent as to significantly disrupt normal behavior patterns...." 50 C.F.R. § 17.3. There is no evidence in the record to support such a finding of harassment.

should the Court consider the lease sale by reference to the complete chain of events which it initiates? The answer to this question cannot be the same for all of the statutes involved here. To determine the proper scope of analysis, the Court must look to the policy behind the statute.

The CZMA, as discussed *supra*, is intended to further the development and implementation of comprehensive management programs for the coastal area. The needs of present and future generations are to be considered during the planning process envisioned by Congress. Under the CZMA, a myopic view of an isolated phase of a multistage project would be inappropriate. The decision-makers must integrate the full panoply of possibilities into a comprehensive plan. Thus, the states and the federal agencies must consider long-term effects as well as immediate effects in order to manage the coastal zone effectively. It would be unrealistic to declare that the goal of Lease Sale No. 53 is merely leasing tracts and not "pumping oil". *See North Slope Borough v. Andrus*, *supra*, at 40. The CZMA requires an evaluation of the consequences of the lease sale as well as the resulting activities occurring as a result of the notice of sale.

In contrast, ESA and the MMPA have a narrower focus. ESA, like the CZMA, is intended to serve the goal of preservation of fragile environmental resources. In the case of ESA, the protected resource is the species threatened with extinction, whereas, under the CZMA, all coastal resources are to be protected to accomplish the goal of preservation. ESA relies on different means from those of the CZMA. ESA does not focus on comprehensive planning. Instead, it prescribes safeguards, such as specific prohibitions on particular acts, such as killing or wounding an endangered species of fish or wildlife. *Sierra Club v. Froehlke*, 534 F.2d 1289 (8th Cir. 1976). Under ESA, the Secretary is required to make individual determinations as events arise concerning the risk posed to a threatened or endangered species by a particular action. It may not be feasible to prescribe the proper safeguards until the discrete stage is at hand. Thus, a more limited focus is appropriate under ESA. The same distinction applies to the MMPA as opposed to the CZMA.

The MMPA prescribes specific safeguards in order to prevent imminent harm or harassment of marine mammals; it provides restrictions on the "taking" and importing of certain species of marine mammals, and provides for enforcement of the restrictions. 16 U.S.C. §§ 1371-1377. A focus on a discrete stage of activity is also appropriate to effectuate the purpose of the MMPA just as it is with respect to the ESA. In sum, in this case, an examination of the threat posed by specific activities at the time the immediate threat is posed will carry out the objectives of the MMPA and ESA.

CONCLUSION

Plaintiffs are entitled to injunctive and declaratory relief on their claims under the CZMA. As to the remaining claims raised in the Complaint, defendants are entitled to judgment as a matter of law.

The Opinion shall constitute the Court's Findings of Fact and Conclusions of Law.

/S/ MARIANA R. PFAELZER
MARIANA R. PFAELZER
United States District Judge

DATED: AUGUST 18, 1981

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 81-2080 MRP

STATE OF CALIFORNIA, ET AL., PLAINTIFFS,

v.

JAMES G. WATT, ET AL., DEFENDANTS

CASE NO. CV 81-2081 MRP

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL., PLAINTIFFS,

v.

JAMES G. WATT, ET AL., DEFENDANTS.

Filed Aug. 18 1981

ORDER AND SUMMARY JUDGMENT

The parties' cross-motions for summary judgment, pursuant to Fed. R. Civ. P. 56, and defendant-intervenors' motion for summary judgment, or, in the alternative, motion to dismiss the complaints of Natural Resources Defense Council, *et al.*, and of the County of Humboldt, *et al.*, pursuant to Fed.R.Civ.P. 12(b)(6) came on for hearing before the Honorable Mariana R. Pfaelzer on July 10, 1981. All parties appeared by and through their respective counsel of record. Having reviewed and considered the administrative record and the memoranda, affidavits, and exhibits filed by the parties, and having heard and considered the oral arguments of counsel, and having taken the matter under submission, the Court has incorporated its Findings of Fact and Conclusions of Law in the Opinion filed herewith. Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. Plaintiffs' Motion for Summary Judgment in CV 81-2080, with respect to the claim arising under the Coastal Zone Management Act, 16 U.S.C. §§ 1451 *et seq.*, is granted. Defendants' Motion for Summary Judgment with respect to plaintiffs' claim arising under the Coastal Zone Management Act is denied.

2. Defendants' decision to lease Tracts 129 to 142, 144 to 146, 148 to 155 and 158 to 161 in the northern portion of the Santa Maria Basin for oil and gas development was made in violation of the Coastal Zone Management Act.

3. Any bids received for the tracts at issue are declared null and void and the monies posted shall be returned to the bidders.

4. Any oil and gas leases for any of the tracts at issue herein awarded as part of Lease Sale No. 53 are declared null and void.

5. Defendants and defendant-intervenors, their officers, agents, employees, representatives, and all persons acting in concert with them, are hereby enjoined from awarding, approving or taking any action or allowing others to take any action pursuant to any leases for any of the tracts at issue, until such time as defendants comply with the requirements of the Coastal Zone Management Act by conducting a consistency determination on the tracts at issue and by conducting all activities on these tracts in a manner consistent with California's Coastal Management Plan.

6. Defendants' Motion for Summary Judgment in CV 81-2080 with respect to plaintiffs' claims arising under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 *et seq.*, the National Environmental Protection Act, 42 U.S.C. §§ 4321 *et seq.*, the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, and the Marine Mammal Protection Act, 16 U.S.C. §§ 1361 *et seq.*, is granted. Plaintiffs' Motion for Summary Judgment in CV 81-2080 with respect to the claims arising under these statutes is denied.

7. Defendent-intervenors' Motion to Dismiss Plaintiffs, Natural Resources Defense Council, *et al.*, in CV 81-2081 pursuant to Fed.R.Civ.P. 12(b)(6)is granted.

8. Defendant-intervenors' Motion to Dismiss Plaintiff-

intervenors, County of Humboldt, *et al.*, in CV 81-2080 pursuant to Fed. R. Civ.P. 12(b)(6) is denied.

9. Each party shall bear its own costs.

10. Judgment is hereby entered.

The Court shall retain continuing jurisdiction over this case to ensure compliance with this Order.

DATED: August 18, 1981

/s/ MARIANA R. PFAELZER

MARIANA R. PFAELZER
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 81-5699, 81-5700, 81-5701, 81-5811, 81-5812, 81-5813, 81-5814, 81-5815, 81-5720, 81-5822

DC CV 81-2080 81-2081 MRP

THE STATE OF CALIFORNIA, ACTING BY AND THROUGH GOVERNOR EDMUND G. BROWN, JR., ET AL.,
PLAINTIFFS-APPELLEES,

v.

JAMES G. WATT, AS SECRETARY OF THE INTERIOR, ET AL.,
DEFENDANTS,

WESTERN OIL AND GAS ASSOCIATION,
A REGIONAL TRADE ASSOCIATION, ET AL.,
DEFENDANTS-IN-INTERVENTION/APPELLANTS.

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed in part, reversed in part, vacated in part, and stayed in part.

Filed and entered: August 12, 1982

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 81-5699, 81-5700, 81-5701, 81-5720, 81-5811, 81-5812, 81-5813, 81-5814, 81-5815, 81-5822

STATE OF CALIFORNIA, ET AL.,
APPELLEES/CROSS-APPELLANTS,

v.

JAMES G. WATT, ET AL., APPELLANTS/CROSS-APPELLEES.

Filed Nov 10 1982

ORDER

Before: SNEED, TANG, and PREGERSON, Circuit Judges

The panel as constituted in the above case has voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestions for en banc rehearing, and no judge of the court has requested a vote on the suggestions. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

APPENDIX E

Section 307 of the Coastal Zone Management Act, 16 U.S.C. (& Supp. V) 1456, provides in pertinent part:

(a) Federal agencies. In carrying out his functions and responsibilities under this title, the Secretary shall consult with, cooperate with, and, to the maximum extent practicable, coordinate his activities with other interested Federal agencies.

(b) Adequate consideration of views of Federal agencies. The Secretary shall not approve the management program submitted by a state pursuant to section 306 [16 USCS § 1455] unless the views of Federal agencies principally affected by such program have been adequately considered.

(c) Consistency of Federal activites with state management programs; certification. (1) Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

(2) Any Federal agency which shall undertake any development project in the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with approved state management programs.

(3)(A) After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. Each coastal state shall establish procedures for public notice in the case of all such certifications and, to the extent it deems appropriate, procedures for public hearings in connection therewith. At the

earliest practicable time, the state of its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification. If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed. No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this title or is otherwise necessary in the interest of national security.

(B) After the management program of any coastal state has been approved by the Secretary under section 306 [16 USCS §1455], any person who submits to the Secretary of the Interior any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.) and regulations under such Act shall, with respect to any exploration, development, or production described in such plan and affecting any land use or water use in the coastal zone of such state, attach to such plan a certification that each activity which is described in detail in such plan complies with such state's approved management program and will be carried out in a manner consistent with such program. No Federal official or agency shall grant such person any license or permit for any activity described in detail in such plan until such state or its designated agency receives a copy of such certification and plan, together with any other necessary data and information, and until—

(i) such state or its designated agency, in accordance with the procedures required to be estab-

lished by such state pursuant to subparagraph (A), concurs with such person's certification and notifies the Secretary and the Secretary of the Interior of such concurrence;

(ii) concurrence by such state with such certification is conclusively presumed, as provided for in subparagraph (A); or

(iii) the Secretary finds, pursuant to subparagraph (A), that each activity which is described in detail in such plan is consistent with the objectives of this title or is otherwise necessary in the interest of national security.

If a state concurs or is conclusively presumed to concur, of if the Secretary makes such a finding, the provisions of subparagraph (A) are not applicable with respect to such person, such state, and any Federal license or permit which is required to conduct any activity affecting land uses or water uses in the coastal zone of such state which is described in detail in the plan to which such concurrence or finding applies. If such state objects to such certification and if the Secretary fails to make a finding under clause (iii) with respect to such certification, or if such person fails substantially to comply with such plan as submitted, such person shall submit an amendment to such plan, or a new plan, to the Secretary of the Interior. With respect to any amendment or new plan submitted to the Secretary of the Interior pursuant to the preceding sentence, the applicable time period for purposes of concurrence by conclusive presumption under subparagraph (A) is 3 months.

* * * * *

The Outer Continental Shelf Lands Act, 43 U.S.C. (& Supp. IV) 1331 *et seq.*, provides in pertinent part:

Section 8(a), 43 U.S.C. (Supp. IV) 13337(a):

> (1) The Secretary is authorized to grant to the highest responsible qualified bidder or bidders by competitive bidding, under regulations promulgated in advance, any oil and gas lease on submerged lands of the outer Continental Shelf which are not covered by leases meeting the requirements of subsection (a) of section 1335 of this title.
>
> * * * * *

Section 11, 43 U.S.C. (Supp. IV) 1340:

> (a) Approved exploration plans. (1) Any agency of the United States and any person authorized by the Secretary may conduct geological and geophysical explorations in the outer Continental Shelf, which do not interfere with or endanger actual operations under any lease maintained or granted pursuant to this Act, and which are not unduly harmful to aquatic life in such area.
>
> (2) The provisions of paragraph (1) of this subsection shall not apply to any person conducting explorations pursuant to an approved exploration plan on any area under lease to such person pursuant to the provisions of this Act.
>
> (b) Oil and gas exploration. Except as provided in subsection (f) of this section, beginning ninety days after the date of enactment of this subsection [enacted Sept. 18, 1978], no exploration pursuant to any oil and gas lease issued or maintained under this Act may be undertaken by the holder of such lease, except in accordance with the provisions of this section.
>
> (c) Plan approval; State concurrence; plan provisions. (1) Except as otherwise provided in the Act, prior to commencing exploration pursuant to any oil and gas lease issued or maintained under this Act, the holder thereof shall submit an exploration plan to the Secretary for approval. Such plan may apply to more than one lease held by a lessee in any one region of the outer Continental Shelf, or by a group of lessees acting under a unitization, pooling, or drilling agreement, and

shall be approved by the Secretary if he finds that such plan is consistent with the provisions of this Act, regulations prescribed under this Act, including regulations prescribed by the Secretary pursuant to paragraph (8) of section 5(a) of this Act [43 USCS § 1334(a)(8)], and the provisions of such lease. The Secretary shall require such modifications of such plan as are necessary to achieve such consistency. The Secretary shall approve such plan, as submitted or modified, within thirty days of its submission, except that the Secretary shall disapprove such plan if he determines that (A) any proposed activity under such plan would result in any condition described in section 5(a)(2)(A)(i) of this Act [43 USCS § 1334(a)(2)(A)(i)], and (B) such proposed activity cannot be modified to avoid such condition. If the Secretary disapproves a plan under the preceding sentence, he may, subject to section 5(a)(2)(B) of this Act [43 USCS § 1334(a)(2)(B)], cancel such lease and the lessee shall be entitled to compensation in accordance with the regulations prescribed under section 5(a)(2)(C)(i) or (ii) of this Act [43 USCS § 1334(a)(2)C)(i) or (ii)].

(2) The Secretary shall not grant any license or permit for any activity described in detail in an exploration plan and affecting any land use or water use in the coastal zone of a State with a coastal zone management program approved pursuant to section 306 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1455) [16 USCS § 1455], unless the State concurs or is conclusively presumed to concur with the consistency certification accompanying such plan pursuant to section 307(c)(3)(B)(i) or (ii) of such Act [16 USCS § 1456(c)(3)(B)(i) or (ii)], or the Secretary of Commerce makes the finding authorized by section 307(c)(3)(B)(iii) of such Act [16 USCS § 1456(c)(3)(B)(iii)].

(3) An exploration plan submitted under this subsection shall include, in the degree of detail which the Secretary may by regulation require—

(A) A schedule of anticipated exploration activities to be undertaken [undertaken]; (GR)(B) a description of equipment to be used for such activities;

(C) the general location of each well to be drilled; and

(D) such other information deemed pertinent by the Secretary.

(4) The Secretary may, by regulation, require that such plan be accompanied by a general statement of development and production intentions which shall be for planning purposes only and which shall not be binding on any party.

(d) Drilling permit. The Secretary may, by regulation, require any lessee operating under an approved exploration plan to obtain a permit prior to drilling any well in accordance with such plan.

(e) Plan revisions; conduct of exploration activities. (1) If a significant revision of an exploration plan approved under this subsection is submitted to the Secretary, the process to be used for the approval of such revision shall be the same as set forth in subsection (c) of this section.

(2) All exploration activities pursuant to any lease shall be conducted in accordance with an approved exploration plan or an approved revision of such plan.

(f) Drilling permits issued and exploration plans approved within 90-day period after September 18, 1978. (1) Exploration activities pursuant to any lease for which a drilling permit has been issued or for which an exploration plan has been approved, prior to ninety days after the date of enactment of this subsection [enacted Sept. 18, 1978], shall be considered in compliance with this section, except that the Secretary may, in accordance with section 5(a)(1)(B) [43 USCS § 1334(a)(1)(B)] of this Act, order a suspension or temporary prohibition of any exploration activities and require a revised exploration plan.

(2) The Secretary may require the holder of a lease described in paragraph (1) of this subsection to supply a general statement in accordance with subsection (c)(4) of this section, or to submit other information.

(3) Nothing in this subsection shall be construed to amend the terms of any permit or plan to which this subsection applies.

(g) Determinations requisite to issuance of permits. Any permit for geological explorations authorized by this section shall be issued only if the Secretary determines, in accordance with regulations issued by the Secretary, that—

(1) The applicant for such permit is qualified;

(2) the exploration will not interfere with or endanger operations under any lease issued or maintained pursuant to this Act; and

(3) such exploration will not be unduly harmful to aquatic life in the area, result in pollution, create hazardous or unsafe conditions, unreasonably interfere with other uses of the area, or disturb any site, structure, or object of historical or archeological significance.

* * * * *

Section 19, 43 U.S.C. (Supp. IV) 1345:

(a) Recommendations regarding size, time, or location of proposed lease sales. Any Governor of any affected States or the executive of any affected local government in such State may submit recommendations to the Secretary regarding the size, timing, or location of a proposed lease sale or with respect to a proposed development and production plan. Prior to submitting recommendations to the Secretary, the executive of any affected local government in any affected State must forward his recommendations to the Governor of such State.

(b) Time for submission of recommendations. Such recommendations shall be submitted within sixty days after notice of such proposed lease sale or after receipt of such development and production plan.

(c) Acceptance or rejection of recommendations. The Secretary shall accept recommendations of the Governor and may accept recommendations of the executive of any affected local government if he determines, after having provided the opportunity for consultation, that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State. For purposes of this subsection, a determination of the national interest shall be based on the desirability of obtaining oil and gas supplies in a balanced manner and on the findings, purposes, and

policies of this Act. The Secretary shall communicate to the Governor, in writing, the reasons for his determination to accept or reject such Governor's recommendations, or to implement any alternative means identified in consultation with the Governor to provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State.

(d) Finality of acceptance or rejection of recommendations. The Secretary's determination that recommendations provide, or do not provide, for a reasonable balance between the national interest and the well-being of the citizens of the affected State shall be final and shall not, alone, be a basis for invalidation of a proposed lease sale or a proposed development and production plan in any suit or judicial review pursuant to section 23 of this Act [43 USCS § 1349], unless found to be arbitrary or capricious.

(e) Cooperative agreements. The Secretary is authorized to enter into cooperative agreements with affected States for purposes which are consistent with this Act and other applicable Federal law. Such agreements may include, but need not be limited to, the sharing of information (in accordance with the provisions of section 26 of this Act [43 USCS § 1352]), the joint utilization of available expertise, the facilitating of permitting procedures, joint planning and review, and the formation of joint surveillance and monitoring arrangements to carry out applicable Federal and State laws, regulations, and stipulations relevant to outer Continental Shelf operations both onshore and offshore.

Section 25, 43 U.S.C. (Supp. IV) 1351:

(a) Development and production plans; submission to Secretary, statement of facilities and operation; submission to Governors of affected States and local governments. (1) Prior to development and production pursuant to an oil and gas lease issued after the date of enactment of this section [enacted Sept 18, 1978] in any area of the outer Continental Shelf, other than the Gulf of Mexico, or issued or maintained prior to such date of enactment in any area of the outer Continental Shelf, other than the Gulf of Mexico, with respect to which no oil or gas has been discovered in paying

quantities prior to such date of enactment [enacted Sept. 18, 1978], the lessee shall submit a development and production plan (hereinafter in this section referred to as a "plan") to the Secretary, for approval pursuant to this section.

(2) A plan shall be accompanied by a statement describing all facilities and operations, other than those on the outer Continental Shelf, proposed by the lessee and known by him (whether or not owned or operated by such lessee) which will be constructed or utilized in the development and production of oil or gas from the lease area, including the location and site of such facilities and operations, the land, labor, material, and energy requirements associated with such facilities and operations, and all environmental and safety safeguards to be implemented.

(3) Except for any privileged or proprietary information (as such term is defined in regulations issued by the Secretary), the Secretary, within ten days after receipt of a plan and statement, shall (A) submit such plan and statement to the Governor of any affected State, and, upon request, to the executive of any affected local government, and (B) make such plan and statement available to any appropriate interstate regional entity and the public.

(b) Development and production activities in accordance with plan as lease requirement. After the date of enactment of this section [enacted Sept. 18, 1978], no oil and gas lease may be issued pursuant to this Act in any region of the outer Continental shelf, other than the Gulf of Mexico, unless such lease requires that development and production activities be carried out in accordance with a plan which complies with the requirements of this section.

(c) Scope and contents of plan. A plan may apply to more than one oil and gas lease, and shall set forth, in the degree of detail established by regulations issued by the Secretary—

(1) The specific work to be performed;

(2) a description of all facilities and operations located on the outer Continental Shelf which are proposed by the lessee or known by him (whether or not owned or operated by such lessee) to be directly re-

lated to the proposed development, including the location and size of such facilities and operations, and the land, labor, material, and energy requirements associated with such facilities and operations;

(3) the environmental safeguards to be implemented on the outer Continental Shelf and how such safeguards are to be implemented;

(4) all safety standards to be met and how such standards are to be met;

(5) an expected rate of development and production and a time schedule for performance; and

(6) such other relevant information as the Secretary may by regulation require.

(d) State occurrence in land or water zone use in coastal zone of state. The Secretary shall not grant any license or permit for any activity described in detail in a plan and affecting any land use or water use in the coastal zone of a State with a coastal zone management program approved pursuant to section 306 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1455) [16 USCS § 1455], unless the State concurs or is conclusively presumed to concur with the consistency certification accompanying such plan pursuant to section 307(c)(3)(B) (i) or (ii) [16 USCS § 1456(c)(3)(B) (i) or (ii)] of such Act, or the Secretary of Commerce makes the finding authorized by section 307(c)(3)(B)(iii) of such Act [16 USCS § 1456(c)(3)(B)(iii)].

(e) Declaration of approval of development and production plan as major Federal action; submission of preliminary or final lease plans prior to commencement of National Environmental Policy provisions procedures.

(1) At least once the Secretary shall declare the approval of a development and production plan in any area or region (as defined by the Secretary) of the outer Continental Shelf, other than the Gulf of Mexico, to be a major Federal action.

(2) The Secretary may require lessees of tracts for which development and production plans have not been approved, to submit preliminary or final plans for their leases, prior to or immediately after a determination by the Secretary that the procedures under the National Environmental Policy Act of 1969 shall commence.

(f) Plans considered major Federal actions; submission of draft environmental impact statement to Governors of affected States and local governments. If approval of a development and production plan is found to be a major Federal action, the Secretary shall transmit the draft environmental impact statement to the Governor of any affected State, and upon request, to the executive of any local government, and shall make such draft available to any appropriate interstate regional entity and the public.

(g) Plans considered nonmajor Federal actions; comments and recommendations from States. If approval of a development and production plan is not found to a major Federal action, the Governor of any affected State and the executive of any affected local government shall have sixty days from the date of receipt of the plan from the Secretary to submit comments and recommendations. Prior to submitting recommendations to the Secretary, the executive of any affected local government must forward his recommendations to the Governor of his State. Such comments and recommendations shall be made available to the public upon request. In addition, any interested person may submit comments and recommendations.

(h) Approval, disapproval of modification of plan; reapplication; periodic review. (1) After reviewing the record of any public hearing held with respect to the approval of a plan pursuant to the National Environmental Policy Act of 1969 or the comments and recommendations submitted under subsection (g) of this section, the Secretary shall, within sixty days after the release of the final environmental impact statement prepared pursuant to the National Environmental Policy Act of 1969 in accordance with subsection (e) of this section, or sixty days after the period provided for comment under subsection (g) of this section, approve, disapprove, or require modifications of the plan. The Secretary shall require modification of a plan if he determines that the lessee has failed to make adequate provision in such plan for safe operations on the lease area or for protection of the human, marine, or coastal environment, including compliance with the regulations prescribed by the Secretary pursuant to paragraph (8) of section 5(a) [43 USCS § 1334(a)(8)] of

this Act. Any modifiction required by the Secretary which involves activities for which a Federal license or permit is required and which affects any land use or water use in the coastal zone of a State with a coastal zone management program approved pursuant to section 306 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1455) [16 USCS § 1455] must receive concurrence by such State with respect to the consistency certification accompanying such plan pursuant to section 307(c)(3)(B)(i) or (ii) [16 USCS § 1456(c)(3)(B)(i) or (ii)] of such Act unless the Secretary of Commerce makes the finding authorized by section 307(c)(3)(B)(iii) [16 USCS § 1456(c)(3)(B)(iii)] of such Act. The Secretary shall disapprove a plan—

(A) if the lessee fails to demonstrate that he can comply with the requirements of this Act or other applicable Federal law, including the regulations prescribed by the Secretary pursuant to paragraph (8) of section 5(a) [43 USCS § 1334(a)(8)] of this Act [43 USCS § 1334(a)(8)];

(B) if any of the activities described in detail in the plan for which a Federal license or permit is required and which affects any land use or water use in the coastal zone of a State with a coastal zone management program approved pursuant to section 306 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1455) [16 USCS § 1455] do not receive concurrence by such State with respect to the consistency certification accompanying such plan pursuant to section 307(c)(3)(B)(i) or (ii) of such Act [16 USCS § 1456(c)(3)(B)(i) or (ii)] and the Secretary of Commerce does not make the finding authorized by section 307(c)(3)(B)(iii) of such Act [16 USCS § 1456(c)(3)(b)(iii)];

(C) if operations threaten national security or national defense; or

(D) if the Secretary determines, because of exceptional geological conditions in the lease areas, exceptional resource values in the marine or coastal environment, or other exceptional circumstances, that (i) implementation of the plan would probably cause serious harm or damage to life (including fish and other acquatic life), to property, to any mineral deposits (in areas leased or not leased), to

the national security or defense, or to the marine, coastal or human environments, (ii) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time, and (iii) the advantages of disapproving the plan outweigh the advantages of development and production.

(2)(A) If a plan is disapproved—

(i) under subparagraph (A) of paragraph (1); or

(ii) under subparagraph (B) of paragraph (1) with respect to a lease issued after approval of a coastal zone management program pursuant to the Coastal Zone Management Act of 1972 (16 U.S.C. 1455),

the lessee shall not be entitled to compensation because of such disapproval.

(B) If a plan is disapproved—

(i) under subparagraph (C) or (D) of paragraph (1); or

(ii) under subparagraph (B) of paragraph (1) with respect to a lease issued before approval of a coastal zone management program pursuant to the Coastal Zone Management Act of 1972, and such approval occurs after the lessee has submitted a plan to the Secretary,

the term of the lease shall be duly extended, and at any time within five years after such disapproval, the lessee may reapply for approval of the same or a modified plan, and the Secretary shall approve, disapprove, or require modifications of such plan in accordance with this subsection.

(C) Upon expiration of the five-year period described in subparagraph (B) of this paragraph, or, in the Secretary's discretion, at an earlier time upon request of a lessee, if the Secretary has not approved a plan, the Secretary shall cancel the lease and the lessee shall be entitled to receive compensation in accordance with section 5(a)(2)(C) of this Act [43 USCS § 1334(a)(2)(C)]. The Secretary may, at any time within the five-year period described in subparagraph (B) of this paragraph, require the lessee to submit a development and production plan for approval, disapproval, or modification. If the lessee fails to submit a required

plan expeditiously and in good faith, the Secretary shall find that the lessee has not been duly diligent in pursuing his obligations under the lease, and shall immediately initiate procedures to cancel such lease, without compensation, under the provisions of section 5(c) of this Act [43 USCS § 1334(c)].

(3) The Secretary shall, from time to time, review each plan approved under this section. Such review shall be based upon changes in available information and other onshore or offshore conditions affecting or impacted by development and production pursuant to such plan. If the review indicates that the plan should be revised to meet the requirements of this subsection, the Secretary shall require such revision.

(i) Approval of revision of approved plan. The Secretary may approve any revision of an approved plan proposed by the lessee if he determines that such revision will lead to greater recovery of oil and natural gas, improve the efficiency, safety, and environmental protection of the recovery operation, is the only means available to avoid substantial economic hardship to the lessee, or is otherwise not inconsistent with the provisions of this Act, to the extent such revision is consistent with protection of the human, marine, and coastal environments. Any revision of an approved plan which the Secretary determines is significant shall be reviewed in accordance with subsections (d) through (f) of this section.

(j) Cancellation of lease on failure to submit plan or comply with approved plan. Whenever the owner of any lease fails to submit a plan in accordance with regulations issued under this section, or fails to comply with an approved plan, the lease may be canceled in accordance with sections (c) and (d) [43 USCS § 1334(c) and (d)]. Termination of a lease failure to comply with an approved plan, including required or revisions, shall not entitle a lessee to any compensation.

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Section 102, 43 U.S.C. (Supp. IV) 1802:

The purposes of this Act are to—

(1) establish policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf which are intended to result in expedited exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade;
(2) preserve, protect, and develop oil and natural gas resources in the Outer Continental Shelf in a manner which is consistent with the need (A) to make such resources available to meet the Nation's energy needs as rapidly as possible, (B) to balance orderly energy resource development with protection of the human, marine, and coastal environments, (C) to insure the public a fair and equitable return on the resources of the Outer Continental Shelf, and (D) to preserve and maintain free enterprise competition;
(3) encourage development of new and improved technology for energy resource production which will eliminate or minimize risk of damage to the human, marine, and coastal environments;
(4) provide States, and through States, local governments, which are impacted by Outer Continetal Shelf oil and gas exploration, development, and production with comprehensive assistance in order to anticipate and plan for such impact, and thereby to assure adequate protection of the human environment;
(5) assure that States, and through States, local governments, have timely access to information regarding activities on the Outer Continental Shelf, and opportunity to review and comment on decisions relating to such activities, in order to anticipate, ameliorate, and plan for the impacts of such activities;
(6) assure that States, and through States, local governments, which are directly affected by exploration, development, and production of oil and natural gas are provided an opportunity to participate in policy and planning decisions relating to management of the resources of the Outer Continental Shelf;
(7) minimize or eliminate conflicts between the exploration, development, and production of oil and

natural gas, and the recovery of other resources such as fish and shellfish;